

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

MICHAEL KOZIARA,

Plaintiff,

-vs-

Case No. 13-CV-834-JDP

BNSF RAILWAY COMPANY,

Madison, Wisconsin

March 2, 2015

Defendant.

12:35 p.m.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF JURY TRIAL

AFTERNOON SESSION

HELD BEFORE JAMES D. PETERSON, and a jury,

APPEARANCES:

For the Plaintiff:

Nichols Kaster

BY: MATTHEW MORGAN

JAMES KASTER

NICHOLAS THOMPSON

4600 IDS Center

80 South Eighth Street

Minneapolis, Minnesota 55402-2242

Also present:

Michael Koziara - plaintiff

Emilee Howe - paralegal

Lynette Swenson RMR, CRR, CBC  
U.S. District Court Federal Reporter  
United States District Court  
120 North Henry Street, Rm. 520  
Madison, Wisconsin 53703  
608-255-3821

1 APPEARANCES CONTINUED:

2 For the Defendant:

3 Ogletree Deakins  
4 BY: BRUCE DOUGLAS  
5 COLTON LONG  
6 Wells Fargo Center  
7 90 South Seventh Street, Ste. 3800  
8 Minneapolis, Minnesota 55402

9 Also present: Jennifer Lenander - Office  
10 Administrator  
11 Jennifer Willingham - BNSF Counsel  
12 Daniel Rankin - General Director  
13 of Line Maintenance

14 \* \* \* \* \*

15 **I-N-D-E-X**

16	Court Instructions	8-22
17	Opening statement by Mr. Morgan	22-40
18	Opening statement by Mr. Douglas	40-60

19	<u>PLAINTIFF'S WITNESSES</u>	<u>EXAMINATION</u>	<u>PAGES</u>
20	MICHAEL KOZIARA	Direct by Mr. Morgan	60-136
21	AL MITCHELL	Direct by Mr. Morgan	137-150
22		Cross by Mr. Douglas	150-162
23		Redirect by Mr. Morgan	162-165
24		Recross by Mr. Douglas	165
25	MICHAEL KOZIARA	Cross by Mr. Douglas	166-214

**E-X-H-I-B-I-T-S**PLAINTIFF'S EXHIBITSIDENTIFIED/RECEIVED

Ex. 2	Personal Injury Report Form	117	118
5	Rule 1.1.2	70	71
7	Level S 30-day suspension	128	128
8	Dismissal notice	134	134
9	Medical record	107	107
11	Photo - crossing	87	88
12	Photo - end loader	92	93
31	Investigative notice	130	130
33	Investigative notice	123	123

DEFENDANT'S EXHIBITS

Ex. 564	Photo - reenactment	155	---
577	Photo - boom truck	200	200
578	Photo - boom truck	---	201
579	Photo - boom truck	---	201
580	Photo - boom truck	---	201
581	Photo - boom truck	---	201
582	Photo - boom truck	---	201
600	Photo - plank lifters	202	203
601	Photo - hydraulic gun	201	201
658	Google earth map	176	176
659	Photo - lag	205	205

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THE COURT: Is there anything for the court before we begin? I have one housekeeping matter for counsel.

MR. DOUGLAS: Your Honor, I do have two things, if I may.

THE COURT: Yeah.

MR. DOUGLAS: First item: Clarification on one of the areas of testimony. It looks like we're kind of moving along more quickly and I'm trying to make sure I

1 get the right witnesses lined up and everything.

2 THE COURT: Okay.

3 MR. DOUGLAS: The Court may remember from the  
4 Pretrial Conference and certain motions in limine there  
5 was discussion about testimony about the Incentive  
6 Compensation Plan, and I recall that in the Pretrial  
7 Order, the Court indicated it did not want to spend a  
8 half a day on that and was not inviting testimony on  
9 that. I guess just clarification to what extent, if  
10 any, is the Court going to allow testimony about the  
11 Incentive Compensation Plan so that both parties can  
12 sort of plan ahead.

13 THE COURT: Just give me the background on it  
14 again. Is this -- this is or is not related to the  
15 points that are assessed?

16 MR. DOUGLAS: This is unrelated to the points  
17 that are assessed. This goes to Mr. Koziara's -- the  
18 plaintiff's claim that the managers may have an  
19 incentive to discourage or deter injury reports because  
20 somehow there's a component in the Incentive  
21 Compensation Plan that relates to safety.

22 THE COURT: Okay. So like if they have reduced  
23 number of workplace injuries, they get --

24 MR. DOUGLAS: Yeah. There's an overall  
25 Incentive Compensation Plan, but it's for both the

1 managers and the scheduled employees. The union people  
2 also have an Incentive Compensation Plan. The plaintiff  
3 inquired as to this a little bit with one of the  
4 30(b)(6) witnesses, Eric Weber. He's not really the  
5 person to testify about that, but there was some  
6 testimony about it. I just wanted to know how deeply  
7 the Court is going to allow counsel to be getting into  
8 that so that we can plan for what we may need to do.

9 THE COURT: Okay. I understood. I recall this  
10 as well. I think it's -- to some extent it's fair game.  
11 And I guess my ruling is, like a lot of these things in  
12 cases like this, it's a potential waste of time, but I  
13 don't think it's fair to say that it's not relevant.  
14 This is plaintiff's theory about why there might be a  
15 motive to retaliate. So I think it's appropriate to go  
16 into at least to acknowledge its existence, to describe  
17 it in some -- at some level of detail, but I think it  
18 is -- it tends to be sort of a side show. So I guess  
19 the guidance that I would give is that it's not  
20 irrelevant, but it's probably not worth spending a  
21 really long time on it. So it gets to the point where  
22 it's a 403 balance where my concern is not -- the  
23 prejudice is I think it's fair cross-examination, fair  
24 impeachment of your employees, but it seems to me it's  
25 really a risk of a big waste of time if it gets too far

1    afield. But if the essential elements of the  
2    compensation suggest they have an incentive to  
3    discourage reporting workplace injuries, that's the  
4    essential point that needs to be conveyed and I hope it  
5    doesn't take long.

6               MR. DOUGLAS: Very well.

7               THE COURT: You can stay seated.

8               MR. DOUGLAS: Thank you, Your Honor. One other  
9    point, and this is perhaps a housekeeping measure. I  
10   want to be clear that we're not doing this to be harsh  
11   or anything, but the plaintiff did request that  
12   witnesses be sequestered and we would request at the  
13   start of the testimony that Mrs. Koziara be excused from  
14   the courtroom on that basis as well.

15              THE COURT: I think that's fair.

16              MR. MORGAN: Your Honor, we don't intend to  
17   call Ms. Koziara as a witness in the liability phase of  
18   the trial. We did list her as a potential witness, but  
19   we don't have any intention of calling her. We are  
20   going to call her if there's a damages phase, so I'm not  
21   as --

22              THE COURT: Does that allay your concern if  
23   she's --

24              MR. DOUGLAS: No, Your Honor. Our desire is  
25   that -- our request is that she be sequestered during

1 the trial.

2 THE COURT: It's upon request. I think it's,  
3 you know, it's granted. And you requested it at the  
4 outset, so she'll be sequestered.

5 MR. MORGAN: Okay. She can stay for the  
6 opening statement?

7 MR. DOUGLAS: No objection to that.

8 THE COURT: Very good. Okay. Anything from  
9 the plaintiff?

10 MR. MORGAN: No, Your Honor.

11 THE COURT: Good. One housekeeping detail that  
12 I don't know if I recorded it. I will take notes on the  
13 proceedings here for my own purposes so I can decide on  
14 motions, but I'm not going to maintain the official list  
15 of exhibits that are in or out. That responsibility is  
16 yours. So I would suggest that whoever is the proponent  
17 of that evidence be pretty assiduous in making sure that  
18 you make a record of the ruling.

19 If I rule and somehow there's a dispute about it  
20 later, I'll just have to rule again. I'd like to think  
21 it's going to be somewhat consistent, but, you know, it  
22 probably is a good idea for you guys, both sides, to  
23 keep track of what evidence has been admitted so that we  
24 can settle on it. And then of course at the end of the  
25 trial, we'll have to figure out what goes back to the

1 jury. So keep careful notes on that. But it's on you,  
2 not me.

3 With that, I think we're ready to bring the jury  
4 back.

5 (Jury brought in courtroom at 12:40 p.m.)

6 THE CLERK: This Honorable Court is again in  
7 session. Please be seated and come to order.

8 THE COURT: Thank you. I notice you audibled  
9 on the positions in the jury box. Did everybody get  
10 into their right seats? It's kind of like elementary  
11 school. You've got to sit where you're -- legal motion  
12 on the line there.

13 So Members of the Jury, we are about to begin the  
14 trial of the case. Before it begins, I will give you  
15 some instructions to help you understand how the trial  
16 will proceed, how you should evaluate the evidence, and  
17 how you should conduct yourselves during the trial.

18 The party who begins the lawsuit is called the  
19 *plaintiff*. In this case the plaintiff is Michael  
20 Koziara. The party against whom the suit is brought is  
21 called the *defendant*. In this case the defendant is  
22 BNSF Railway Company. This case involves the Federal  
23 Railroad Safety Act, a law that prohibits railroads from  
24 retaliating against employees for reporting work-related  
25 injuries. Mr. Koziara claims that he suffered a



1 fracture to his left leg when he was supervising a work  
2 crew at a location known as East Winona near La Crosse,  
3 Wisconsin. The crew was removing planks from a track  
4 bed. In the course of investigating Mr. Koziara's  
5 injury, BNSF came to believe that he had stolen property  
6 from the railroad company a week before his injury.  
7 BNSF allegedly suspended Mr. Koziara for his involvement  
8 in the accident that led to his injury and BNSF claims  
9 to have terminated him for stealing company property.

10 In this case, Mr. Koziara claims that BNSF  
11 suspended and then terminated him because he reported an  
12 injury in violation of the Federal Railroad Safety Act.  
13 BNSF claims that Mr. Koziara did not report his injury  
14 in good faith and that BNSF would have suspended and  
15 terminated Mr. Koziara regardless of whether he had  
16 reported the injury. You, the jury, will decide whether  
17 Mr. Koziara reported his injury in good faith and you  
18 will decide whether BNSF would have suspended and then  
19 terminated Mr. Koziara regardless of whether he had  
20 reported the injury.

21 I have some instructions concerning the conduct of  
22 the case. The case will proceed as follows: First,  
23 plaintiff's counsel will make an opening statement  
24 outlining plaintiff's case. Immediately after  
25 plaintiff's statement, defendant's counsel will make an

1 opening statement outlining defendant's case. What is  
2 said in opening statements is not evidence. It is  
3 simply a guide to help you understand what each party  
4 expects the evidence to show.

5 Second. After the opening statements the plaintiff  
6 will introduce evidence in support of his claim. At the  
7 conclusion of the plaintiff's case, the defendant may  
8 introduce evidence. The plaintiff may then choose to  
9 introduce rebuttal evidence.

10 Third. After the evidence is presented, the  
11 parties will make closing arguments explaining what they  
12 believe the evidence has shown and what inferences you  
13 should draw from the evidence. What is said in closing  
14 argument is not evidence. The plaintiff has the right  
15 to give the first closing argument and to make a short  
16 rebuttal argument after the defendant's closing  
17 argument.

18 Fourth. I will instruct you on the law that you  
19 are to apply in reaching your verdict.

20 Fifth. You will retire to the jury room and begin  
21 your deliberations.

22 The trial day will run from 9 a.m. to 5:30 p.m.  
23 You will have at least an hour for lunch and two  
24 additional short breaks, one in the morning and one in  
25 the afternoon. The courtroom is often kept chilly. You

1 are welcome to dress accordingly.

2 During recesses, you should keep in mind the  
3 following instructions. These are some of the ones that  
4 I previewed for you when I sent you out before lunch.  
5 First. Do not discuss the case either among yourselves  
6 or with anyone else during the course of the trial. The  
7 parties to this lawsuit have a right to expect from you  
8 that you will keep an open mind throughout the trial.  
9 You should not reach a conclusion until you have heard  
10 all of the evidence and you have heard the lawyers'  
11 closing arguments and my instructions to you on the law  
12 and you have retired to deliberate with the other  
13 members of the jury.

14 I must warn you in particular against commenting  
15 about the trial in an email or a blog or Twitter or any  
16 social media website. There have been news accounts  
17 recently about cases that have had to be retried because  
18 a member of the jury communicated electronically about a  
19 case during the trial. You can imagine what this would  
20 mean and the cost of a retrial, the inconvenience to  
21 your fellow jurors whose work would have been done for  
22 nothing, and the stress experienced by the parties.

23 Second. Do not permit any third person to discuss  
24 the case in your presence. If anyone tries to talk to  
25 you, despite your telling him not to, report that fact

1 to the Court as soon as you are able. Do not discuss  
2 the event with your fellow jurors or discuss with them  
3 any other fact that you believe you should bring to the  
4 attention of the Court.

5 Third. Although it is a normal human tendency to  
6 converse with people with whom one is thrown into  
7 contact, please do not talk to any of the parties or  
8 their attorneys or witnesses. By this I mean not only  
9 do not talk about the case, but do not talk at all, even  
10 to pass the time of day. In no other way can all the  
11 parties be assured of the absolute impartiality they are  
12 entitled to expect from you as jurors. We have kind of  
13 a small courthouse here, so it's not really an unusual  
14 circumstance for you to be in the lobby at the same time  
15 as any of the counsel. They are instructed to act as  
16 though you're not there and you should do the same to  
17 them and it's a special suspense of our rule that we be  
18 polite to each other normally, but just ignore them and  
19 they will ignore you, but don't take it personally.

20 Fourth. Do not read about the case in the  
21 newspapers or listen to radio or television broadcasts  
22 about the trial. If a newspaper headline catches your  
23 eye, do not examine the article further. Media accounts  
24 may be inaccurate and may contain matters that are not  
25 proper for your consideration. You must base your

1 verdict solely on the evidence presented in court.

2 Fifth. No matter how interested you may become in  
3 the facts of this case, you must not do any independent  
4 research, investigation or experimentation. Do not look  
5 up materials on the internet or any other sources.  
6 Again, you must base your verdict solely on the evidence  
7 presented in court.

8 When the case is over, you can answer your friends'  
9 and family's questions about what happened in court and  
10 you can talk about it afterwards. But until this case  
11 is done, don't discuss it with anyone. After you've  
12 heard all of the evidence, I will give you some detailed  
13 instructions about the law that you will apply. But to  
14 guide you as you hear the evidence, I will provide you  
15 with a brief summary of the basic principles applicable  
16 to this case right now.

17 Mr. Koziara's claims are based on the provisions of  
18 the federal statute entitled *The Federal Railroad Safety*  
19 *Act*. We sometimes go crazy with acronyms and  
20 abbreviations, so you might hear it referred to as the  
21 FRSA. That's the Federal Railroad Safety Act. This  
22 statute prohibits discrimination in the form of  
23 retaliation against a railroad employee who, in good  
24 faith, reports to his employer a workplace injury.

25 You will have two general issues to address in this

1 case. The first issue is whether Mr. Koziara has proven  
2 that he reported a workplace injury in good faith, which  
3 means that Mr. Koziara actually and reasonably believed  
4 that he had been injured on the job. If you conclude  
5 that Mr. Koziara has proven this element, then you will  
6 address the second issue in this case: Whether BNSF  
7 would have taken the same unfavorable actions in the  
8 absence of Mr. Koziara's injury report.

9 Let me stop right here to tell you that when you go  
10 back to deliberate, you'll have a copy of these  
11 instructions that I'm reading to you now and you'll also  
12 have a copy of the more detailed instructions that I'll  
13 give to you at the end of the case. You'll have those  
14 in writing.

15 Let's talk about what's going to happen when you're  
16 hearing the evidence. First subject is burden of proof.  
17 You will hear the term *burden of proof* used during this  
18 trial. In simple terms, the phrase burden of proof  
19 means that the party who makes a claim or asserts a  
20 defense has the obligation of proving that claim or  
21 defense. Mr. Koziara has the burden to prove that he  
22 reported his injury in good faith. BNSF has the burden  
23 to prove that it would have suspended and terminated  
24 Mr. Koziara regardless of his injury report. At the end  
25 of the trial, I will instruct you on the proper burden

1 of proof to be applied in this case.

2       Credibility of witnesses. In deciding the facts,  
3 you may have to decide which testimony to believe and  
4 which testimony not to believe. You may believe  
5 everything a witness says, part of it, or none of it.  
6 In considering the testimony of any witness, you may  
7 take into account many factors, including the witness's  
8 opportunity and ability to see or hear or know the  
9 things the witness testifies about; the quality of the  
10 witness's memory; the witness's appearance and manner  
11 while testifying; the witness's interest in the outcome  
12 of the case; any bias or prejudice the witness may have;  
13 any other evidence that may have contradicted the  
14 witness's testimony, and the reasonableness of the  
15 witness's testimony in light of all the evidence. The  
16 weight of the evidence does not necessarily depend on  
17 the number of witnesses who testify.

18       Depositions. During the course of the trial, the  
19 lawyers may refer to and read from depositions.  
20 Depositions are transcripts of testimony taken while the  
21 parties are preparing for trial. Deposition testimony  
22 is given under oath, just like testimony given during  
23 the trial. You should give it the same consideration  
24 you would give it had the witness testified here in  
25 court.

1           Objections. During the trial you will hear the  
2 lawyers make objections to certain questions or to  
3 certain answers of the witness -- answers of the  
4 witnesses. When they do, it is because they believe the  
5 question or answer is legally improper and they want me  
6 to rule on it. Do not try to guess why the objection is  
7 being made or what the answer would have been if the  
8 witness had been allowed to answer it. If I tell you  
9 not to consider a particular statement that has already  
10 been made, put that statement out of your mind and  
11 remember that you may not refer to it in your  
12 deliberations.

13           Questions. During the trial I may sometimes ask a  
14 witness questions. Please do not assume that I have any  
15 opinion about the subject matter of my questions. If  
16 you wish to ask a question about something you do not  
17 understand, write it down on a slip of paper. When the  
18 lawyers have finished all their questions to the  
19 witnesses, if your -- to each witness, if your question  
20 is still unanswered to your satisfaction, raise your  
21 hand and I will take the written question from you, show  
22 it to counsel and decide whether the question is one  
23 that can be asked. If it cannot, I will tell you that.  
24 I will try to remember to ask questions after each  
25 witness -- to ask you about questions after each has



1 testified. It's easy to forget for me. So if you have  
2 a question when a witness is done, before I say you may  
3 step down, just raise your hand and I'll be able to see  
4 you do that. But if you have a question, write it on a  
5 piece of paper and then send it over. Sometimes juries  
6 ask really great questions and it's really, really very  
7 useful, so I'm happy to have your questions. Sometimes  
8 you may ask a question about a subject that for whatever  
9 reason under the Rules of Evidence concerns some  
10 material that's not proper to consider in a proceeding  
11 like this, and if that's the case, I'll just say we  
12 can't ask that question. So don't draw any inferences  
13 about why that's so. The Rules of Evidence protect both  
14 parties' interest in a fair trial, so sometimes it  
15 restricts the information that we can get to you. So  
16 don't forget, if you have questions, just raise your  
17 hand. I'll see you.

18 Notetaking. If you want to take notes, there are  
19 notepads and pencils next to the jury bench. This does  
20 not mean you have to take notes. Take them only if you  
21 want to and only if you think they will help you recall  
22 the evidence during your deliberation. Do not let  
23 notetaking interfere with your important duties of  
24 listening carefully to all of the evidence and of  
25 evaluating the credibility of witnesses. Keep in mind

1 that just because you've written something down, it does  
2 not mean that the written note is more accurate than  
3 another juror's mental recollection of the same thing.  
4 No one of you is the secretary for the jury charged with  
5 the responsibility of recording the evidence. Each of  
6 you is responsible for recalling the testimony and other  
7 evidence.

8 Although you can see that the trial is being  
9 recorded by a court reporter, you should not expect to  
10 use the trial transcripts in your deliberations. You  
11 will have to rely on your own memories.

12 Evidence. Evidence at a trial includes the sworn  
13 testimony of the witnesses, exhibits admitted into the  
14 record, facts judicially noticed, and facts stipulated  
15 by counsel. You may consider only evidence that is  
16 admitted into the record.

17 In deciding the facts of this case, you are not to  
18 consider the following as evidence: Statements and  
19 arguments of the lawyers; questions and objections of  
20 the lawyers; testimony that I instruct you to disregard;  
21 and anything you may see or hear when the court is not  
22 in session even if what you see or hear is done or said  
23 by one of the parties or by one of the witnesses.

24 Evidence may be either direct or circumstantial.  
25 Direct evidence is direct proof of a fact such as

1 testimony by a witness about what the witness said or  
2 heard or did. Circumstantial evidence is proof of one  
3 or more facts from which you could infer the existence  
4 of another fact. If the question were whether it was  
5 raining on September 1st, direct evidence of this fact  
6 would be a witness's testimony that they were outside  
7 and they saw it raining that day. Circumstantial  
8 evidence of the fact that it was raining would be that  
9 people came into a building carrying wet umbrellas that  
10 day. You should consider both kinds of evidence. The  
11 law makes no distinction to the evidence between direct  
12 or circumstantial evidence. You are to decide how much  
13 weight to give any evidence.

14 Contradictory or impeaching evidence. A witness  
15 may be discredited by contradictory evidence or by  
16 evidence that at some other time the witness has said or  
17 done something or failed to do or say something that is  
18 inconsistent with the witness's present testimony. If  
19 you believe any witness has been discredited, it is up  
20 to you to decide how much of the testimony of that  
21 witness you believe. If a witness is shown to have  
22 given false testimony knowingly, that is voluntarily and  
23 intentionally, about any important matter, you have a  
24 right to distrust the witness's testimony about other  
25 matters. You may reject all the testimony of that

1 witness or you may choose to believe some or all of it.

2       The general rule is that if you find that a witness  
3 has said something before the trial that is different  
4 from what the witness said at trial, you are considered  
5 -- you are to consider the earlier statements only as an  
6 aid in evaluating the truthfulness of the witness's  
7 testimony at trial. You cannot consider as evidence in  
8 this trial what was said before the trial began.

9       There is an exception to this general rule for  
10 witnesses who are the actual parties in this case. If  
11 you find that any party -- if you find that any of the  
12 parties made statements before the trial that -- before  
13 the trial began that are different from the statements  
14 that they made at trial, you may consider as evidence in  
15 this case whichever statement you find more believable.  
16 So for witnesses generally, if somebody tries to point  
17 out that they said something different before the trial,  
18 that will help you decide if the witness is telling the  
19 truth in this courtroom. But if it's an actual party,  
20 if it's Mr. Koziara or an employee of BNSF, if it turns  
21 out that they said something different before the trial,  
22 you can consider that earlier statement as actual  
23 evidence in this case.

24       Drawing of inferences. You are to consider only  
25 the evidence in the case. But in your consideration of

1 the evidence, you are not limited solely to what you see  
2 and hear as the witnesses testify. You are permitted to  
3 draw from facts you find have been proved such  
4 reasonable conclusions as seem justified in the light of  
5 your own experience and common sense.

6 Experts. A person's training and experience may  
7 make him or her a true expert in a technical field. The  
8 law allows that person to state an opinion here about  
9 matters in that particular field. It is up to you to  
10 decide whether you believe the expert's testimony and  
11 choose to rely upon it. Part of that decision will  
12 depend on your judgment about whether the expert's  
13 background, training and experience is sufficient for  
14 him or her to give the expert opinion that you heard;  
15 whether the expert's opinions are based on sound  
16 reasons, judgment and information.

17 During the trial an expert witness may be asked a  
18 question based on assumptions that certain facts are  
19 true and then asked for his or her opinion based upon  
20 that assumption. Such an opinion is of use to you only  
21 if the opinion is based upon assumed facts that are  
22 proven later. If you find that the assumptions stated  
23 in the question have not been proven, then you should  
24 not give any weight to the answer the expert gave to the  
25 question.

1           That concludes my opening instructions. You are  
2 about to hear the opening statements of counsel.  
3 Although these statements are not evidence, they should  
4 help you understand the evidence that you will soon see  
5 and hear. With that, you may present.

6           MR. MORGAN: Thank you, Your Honor. May it  
7 please the Court. Counsel.

8           "This isn't good." Those are the words BNSF  
9 manager Bob Kramer spoke to plaintiff Mike Koziara when  
10 he -- when Mr. Koziara handed Mr. Kramer a Personal  
11 Injury Report Form on Thursday, or excuse me, Tuesday,  
12 September 14th, 2010, after learning that he had  
13 suffered a broken bone in his left leg when a 1200 pound  
14 piece of wood hit it while Mike was working on the  
15 railroad tracks.

16           You will hear that within exactly two months of  
17 Mike suffering an injury and reporting it to BNSF, the  
18 company suspended and then terminated Mike Koziara, who  
19 at the time had been working at the company for 32  
20 years. That's what this case is about.

21           Now, all plaintiff, Mr. Koziara, has to prove to  
22 you is that he reported the injury in good faith to  
23 BNSF. We intend to stay focused on that one issue  
24 during this case and then we're going to sit down and  
25 rest, and it will be BNSF's turn to try to prove to you

1 that it would have suspended and terminated Mike Koziara  
2 even if he hadn't reported the injury.

3 I want to start by briefly walking through a  
4 timeline that includes undisputed facts, undisputed  
5 facts in this case. On September 9, 2010, Mr. Koziara  
6 was injured at work and later the same day reported the  
7 injury to BNSF manager Don Jones.

8 On September 13th, that following Monday,  
9 Mr. Koziara is diagnosed with a fractured bone in his  
10 left leg.

11 Mr. Koziara then informs his direct supervisor,  
12 Mike Veitz, about the fracture and is directed to fill  
13 out a Personal Injury Report Form, which he does on  
14 September 14th, 2010. He completes and submits the  
15 Personal Injury Report Form.

16 Two days later, on September 16th, 2010, BNSF  
17 informs Mr. Koziara that he's under investigation for  
18 failing to be "alert and attentive as well as for being  
19 careless resulting in personal injury."

20 On October 5th, 2010, BNSF issues another notice,  
21 this time informing Mr. Koziara that he's under  
22 investigation for theft and dishonest conduct for  
23 removing BNSF property.

24 October 18, Mr. Koziara receives a 30-day record  
25 suspension for "failure to be alert and carelessness or

1 alert and attentive and carelessness resulting in  
2 personal injury."

3 And lastly, on November 9th, two months after the  
4 injury he suffered, BNSF terminates Mr. Koziara for  
5 theft and dishonest conduct. That timeline, Ladies and  
6 Gentlemen, will be and is undisputed.

7 So who is Mr. Mike Koziara? He's 55 years old. He  
8 just had a birthday this past Saturday. He's been  
9 married to Joan for 25 years. He began working for BNSF  
10 in 1978. He started as a laborer, proceeded to become a  
11 welder, and then was ultimately a foreman. He worked in  
12 the foreman role for the last several years before he  
13 was terminated in 2010.

14 Mr. Koziara is also a member of the membership  
15 of -- the Brotherhood of the Maintenance of Way, which  
16 is a division of the Teamsters. He was a member of this  
17 union while he was employed by BNSF. He held positions  
18 such as Local chapter president and he held a  
19 Legislative Director position at the time he was  
20 terminated in the fall of 2010.

21 Mike's entire professional life literally within  
22 months after he graduated from high school in 1978 was  
23 devoted to BNSF. It was spent mostly outside doing  
24 manual labor, fixing and maintaining railroad tracks  
25 from Wisconsin to Chicago to Kansas City to Paducah,



1 Kentucky, and all parts in between. This work was  
2 manual labor that involved heavy tools and equipment.  
3 Accidents and injuries were a part of Mr. Koziara's  
4 life.

5 First instance in 1988, Mike was injured on the job  
6 when he slipped and fell into a hole that was surrounded  
7 by barbed wire. Just as he did in this case, Mike  
8 filled out a Personal Injury Report Form for that injury  
9 to give to his supervisor. His supervisor at the time,  
10 who had possession of the form, came up to Mike,  
11 confronted him, ripped the Personal Injury Report Form  
12 in half, and threatened Mike with discipline. Mike  
13 never forgot that experience.

14 As prevalent as accidents and injuries are, the  
15 work rules that Mike Koziara and his fellow co-workers  
16 out on the track have to comply with are equally  
17 prevalent. You'll see that I think BNSF has seven  
18 different sets of rule books. These are all the rule  
19 books. One of the rule books is the Maintenance of Way  
20 Operating Rules. And I've called that up on the screen.  
21 One of the rules is Rule 1.1.2, the rule that says you  
22 have to be alert and attentive. And I've called that  
23 rule on the screen.

24 You will note that there is a reference to  
25 preventing injuries and avoiding injuries in the very

1 rule. That history dated back to 1988. The context of  
2 all of the workplace rules will be important for you to  
3 consider as you're hearing about all the facts in this  
4 case and deciding the facts of this case.

5 So now let's turn to September 9th of 2010. Mike  
6 was a foreman for a work crew of railroad maintenance  
7 workers who were tasked to remove a set of crossing  
8 planks from a railroad crossing near East Winona,  
9 Wisconsin. East Winona is just on the other side of the  
10 -- the Wisconsin side of the Mississippi River just  
11 across from Winona, Wisconsin. One of the 1200-pound  
12 crossing planks being lifted out of the ground shot  
13 across the tracks and hit Mike's left leg in the shin  
14 just above his ankle.

15 Another worker, a co-worker, Al Mitchell, who you  
16 will also hear from in this trial, was standing within  
17 several feet of Mike Koziara when Mike got hit.  
18 Initially Mike thought his leg was only badly bruised.  
19 You will hear him testify that he was in shock, that his  
20 leg hurt, that after several minutes he went and sat  
21 down, took off his boot to look at it and saw that it  
22 was bruised and saw that it was cut, but he put a  
23 bandage on it, wrapped it, and continued working that  
24 day. He thought he had only gotten bruised. He was  
25 able to walk on his foot still or on his leg.

1           On September 9th, at the end of the workday,  
2 Mr. Koziara, because he was a 32-year employee, knew  
3 that he had to report the injury; and although Al  
4 Mitchell was standing next to him and also witnessed the  
5 injury, Mike knew he had to report it himself, and he  
6 did report it the day it occurred, September 9th, 2010.  
7 When he talked to Don Jones back at the train depot that  
8 afternoon, Mr. Jones says, "Either it's an injury or  
9 it's not." He says, "If you fill out the form, the  
10 Personal Injury Report Form, BNSF will have to do a  
11 reenactment," basically a replay of how the injury  
12 occurred.

13           He also told Mr. Koziara that Mr. Koziara had 72  
14 hours to fill out the Personal Injury Report Form.  
15 Mr. Koziara didn't fill out a Personal Injury Report  
16 Form on Thursday afternoon and he didn't because he  
17 didn't know his -- he had fractured a bone in his leg.  
18 He thought he had gotten lucky; he thought it was just a  
19 bad bruise. He was able to continue to walk on it.

20           So we fast forward to Friday, September 10th.  
21 Mr. Koziara worked through the day. He will tell you he  
22 woke up; it felt stiff, it felt sore, but he wrapped it  
23 and he was able to walk and he went to work. He was in  
24 pain and he walked with a little bit of a limp, but he  
25 worked throughout the day. And like I -- you'll hear

1 him testify he believed he got lucky. He believed he  
2 hadn't broken a bone and that it was just a bad bruise.

3 This is the last day that Mike Koziara ever works  
4 on railroad tracks for BNSF Railway. September 10th,  
5 2010. September 11 and 12 is a weekend. Mr. Koziara  
6 did not have to work that weekend. He largely stayed  
7 around the home, laid low, didn't do anything out of the  
8 ordinary.

9 September 13, 2010, is a Monday. He is previously  
10 scheduled to be off of work that day. He had a doctor's  
11 appointment unrelated to the injury from the previous  
12 Thursday, and he also had to attend to some union  
13 business through his legislative position in Milwaukee.  
14 And so that was a preapproved, prescheduled day off.

15 He went to his doctor's appointment, and he told  
16 the doctor that he had hurt his leg. And during the  
17 routine physical, the doctor looked at the leg, noticed  
18 it was tender, saw the bruise, saw the cut, and  
19 recommended that Mike get an x-ray, and he did get an  
20 x-ray. And the x-ray revealed that he had a fractured  
21 bone in his left leg.

22 This is P-9, which is Plaintiff's Exhibit 9. It's  
23 part of a medical record from Monday, September 13,  
24 2010, and you can see Michael returns from x-ray and  
25 there's a distal tibial fracture, which I had Dr. Chad

1 Harbour from orthopedics review. And then the next  
2 sentence says, "He was recommended a walking boot" and a  
3 follow-up with him in two weeks.

4 Mike is going to tell you that that was a  
5 significant moment in his life. He was scared.  
6 Although he reported the injury the previous Thursday to  
7 Mr. Jones when it occurred, remember he didn't fill out  
8 a Personal Injury Report Form and knew now that it was  
9 diagnosed as a fracture, he had to fill out the report  
10 form, the same report form that was ripped in two in  
11 front of him in 1988. He also believed he only had 72  
12 hours to report the injury, because that's what  
13 Mr. Jones told him, and he was past the 72 hours at that  
14 point. So he was scared. He thought it was too late  
15 and that he would be disciplined for late reporting.

16 After he left the doctor's office on Monday, the  
17 13th, still thinking about what would happen if he  
18 turned in the Personal Injury Report Form, he called two  
19 of his co-workers, Brad Underhill and Tom Arentz.  
20 They're not BNSF management, they're co-workers. They  
21 work maintenance on the railroad tracks just like Mike.  
22 And he told Mr. Underhill and Mr. Arentz a different  
23 story. He said that he had gotten injured at home over  
24 the weekend and that he was going to be off of work for  
25 awhile.

1 Mike then placed two additional calls, one to a Don  
2 Willing and one to a Russ Ingebritson. Mr. Willing is  
3 an officer with the union, the Brotherhood of  
4 Maintenance of Way, and Mr. Ingebritson is actually an  
5 attorney in the Minneapolis area who does railroad  
6 litigation. And he had talked to them both about this  
7 injury and they instructed him to report it. They told  
8 him he had to report the Personal Injury Report Form.

9 So taking that information in, on the same day  
10 Mr. Koziara calls Mr. Underhill and Mr. Arentz back and  
11 he apologizes and said the real story is the injury that  
12 happened last Thursday resulted in a broken bone in my  
13 leg and I'm sorry I told you a different story. He did  
14 it that night.

15 Either late on the 13th or early September 14th,  
16 Mr. Koziara, while in Milwaukee, called Mike Veitz, his  
17 direct supervisor. And he told Mr. Veitz about the  
18 fracture; the x-ray and the fracture. And Mr. Veitz, no  
19 surprise, instructed Mr. Koziara to fill out a BNSF  
20 Personal Injury Report Form.

21 Now Mr. Veitz was tending to a train derailment and  
22 wasn't in the La Crosse area when he received the phone  
23 calls from Mr. Koziara on the 14th in the morning. He  
24 was attending to a train derailment and he had a couple  
25 of his managers with him at that train derailment. One

1 of them was Dan Rankin, who's sitting in the courtroom  
2 in the chair right behind counsel's table, and another  
3 was Gary Wischover. They are both there tending to the  
4 train derailment. And they instructed -- Mike Veitz get  
5 off the phone with Mike and told them immediately about  
6 the broken leg and they instructed Mr. Veitz to  
7 immediately conduct a reenactment, just as Mr. Jones  
8 predicted would happen the previous Thursday.

9 So on the 14th, Mike did what he was told, did what  
10 he intended to do anyway, which was return to La Crosse  
11 from Milwaukee. He went to the La Crosse train depot.  
12 He brought an individual by the name of James Schaitel  
13 with him. Mr. Schaitel was the former Local union  
14 president, and he brought him there for support, and he  
15 filled out the Personal Injury Report Form at the  
16 La Crosse train depot and he submitted the Personal  
17 Injury Report Form to Bob Kramer, a trainmaster with the  
18 company, BNSF management. And as he was handing  
19 Mr. Kramer the Personal Injury Report Form, Mr. Kramer  
20 says to him "This isn't good."

21 Submitting this Personal Injury Report Form started  
22 a string of events that resulted in his suspension and  
23 his termination.

24 You'll see on your screens before you Plaintiff's  
25 Exhibit 33. This is the notice dated September 16,

1 2010, just two days after he submits the Personal Injury  
2 Report Form. This is the language: "You should attend  
3 an investigation on Thursday, September 23rd, for the  
4 purposes of ascertaining facts and determining your  
5 responsibility, if any, in connection with your alleged  
6 failure to be alert and attentive and carelessness when  
7 you allegedly did not safely remove crossing board  
8 resulting in your, your, Mr. Koziara's personal injury  
9 while assigned as foreman."

10 So this notice got to him. He had to go -- Mike  
11 had to go into the depot and sign a form acknowledging  
12 that he received the notice of investigation two days  
13 after he submitted the report form. It was also before  
14 Mr. Veitz had even conducted the reenactment of what had  
15 happened.

16 That happened the next day. No other worker who  
17 was at the site of the incident on September 9th  
18 received a notice of investigation that you just saw,  
19 just Mr. Koziara. And no one else at the site of the  
20 incident that day was charged with any rule violation,  
21 just Mr. Koziara.

22 Here are the two rules that the notice refers to.  
23 Now it doesn't refer to it by the specific number, but  
24 by the words. Alert and Attentive. 1.1.2. You saw  
25 this earlier in my remarks. This was one of the rules



1 that he was being charged with violating, and the second  
2 one was Rule 1.6, Conduct. And you see under number one  
3 there is a reference to carelessness of the safety of  
4 themselves or others.

5 As I mentioned, the reenactment occurred the next  
6 day, September 17th, 2010. And it's supposed to be  
7 done, the stated reason is to ascertain the facts of the  
8 incident. Mr. Koziara was not invited to the  
9 reenactment and he didn't attend it. Al Mitchell, who  
10 was standing several feet next to Mr. Koziara when  
11 Mr. Koziara was hit by the crossing plank, wasn't  
12 invited and didn't attend the reenactment.

13 There was also a discussion that day during the  
14 reenactment about Mr. Koziara giving away some old track  
15 ties weeks earlier.

16 Now the investigation hearing with regard to the  
17 allegations about failing to be alert and attentive and  
18 carelessness occurred on September 23rd, 2010. So he  
19 received the notice on the 16th and one week later he  
20 has his hearing.

21 Now you're going to hear about these investigatory  
22 hearings at BNSF. You're going to hear that the person  
23 who presides over the hearing is BNSF management.  
24 You're going to hear that Mr. Koziara didn't have a  
25 right to an attorney at the hearing. You're going to

1 hear that he didn't have the right to subpoena or compel  
2 witnesses to attend the hearing. You're going to hear  
3 that the witnesses who did testify don't have to take an  
4 oath, like they're going to over the course of the next  
5 several days; like you did earlier this morning. They  
6 don't have to do that.

7 And Mr. Michael Heille, who is the officer in both  
8 this first investigation and the next one that I'll tell  
9 you about, estimated in his deposition, and I presume  
10 will testify later this week, that of the hearings he  
11 presides over, BNSF wins 95 percent of the time. He  
12 says 10 out of 200. I did the math.

13 On October 5th -- so he has the hearing on the 23rd  
14 regarding the incident that resulted in the injury, and  
15 then on October 5th, he's given a second notice of  
16 investigation. This time for theft and dishonest  
17 conduct. This has to do with the discussion that  
18 occurred at the reenactment on the 17th about  
19 Mr. Koziara giving away some old track ties. They're  
20 actually switch ties, not track ties. Switch ties are  
21 longer than track ties and exist when the train is  
22 moving from one rail to the other. They call it a  
23 switch. So they're the longer ties. He did take and  
24 give away twenty ties, and we'll get to that. But  
25 that's what this notice dated October 5th, 2010, Exhibit

1 P31, is all about.

2 And you can see the reference to the timing, the  
3 misuse they allege of company property for your personal  
4 use while on duty in the morning of September 2nd or  
5 3rd, a week before September 9th. So the events, as I  
6 indicated, occurred before Mr. Koziara was injured, and  
7 Mr. Koziara will tell you that he received permission  
8 from his direct supervisor, Mr. Michael Veitz, to take  
9 and then give away the twenty switch ties.

10 You're going to hear Mr. Koziara say that he's  
11 previously taken ties and he's gotten permission from  
12 Mr. Veitz in the past and it's never been an issue; that  
13 he had never been disciplined before for taking ties.

14 There were others that assisted in the removal of  
15 these twenty switch ties that day, others from the  
16 company, and you're going to hear them say Mr. Koziara  
17 had others from the company help him, on work time,  
18 using company equipment. No other employee was or  
19 received a notice of investigation for theft or  
20 dishonest conduct, just Mike.

21 Now, the rule that BNSF relied on to allege that  
22 Mike had committed theft and was dishonest is the same  
23 rule, 1.6, that he was charged with with regard to the  
24 incident. But this time instead of subset one, they're  
25 relying on subset four, which is dishonesty.

1           October 18th, if we continue the story and the  
2 timeline, is the day he receives notice of discipline  
3 for failing to be alert and attentive and careless. He  
4 lost his investigatory hearing, and so the company  
5 issued a Level S 30-day record suspension. They said  
6 that he failed to be alert and attentive and he was  
7 careless when he didn't remove -- safely remove a  
8 crossing plank on September 9th resulting in your  
9 personal injury. That's Exhibit P7.

10           Ironically the very same day he received the  
11 discipline, the 30-day record suspension, is the day he  
12 has to attend the second investigation hearing, this  
13 time for theft and dishonest conduct over this giving  
14 away of twenty switch ties. The same deal, conducted by  
15 BNSF management; in fact, it was conducted by the same  
16 officer. Michael Heille conducted the first  
17 investigatory hearing and he conducted the second. But  
18 in this case, in this hearing, just like in the first,  
19 no right to an attorney, no right to compel witnesses to  
20 testify, certainly not under oath.

21           Mr. Koziara lost that hearing too, and on November  
22 9th, 2010, he received the dismissal notice ending his  
23 32 years of employment at BNSF. They say that he was --  
24 his employment -- and that he "would be dismissed  
25 effective immediately from employment for theft and

1 dishonest conduct when he was involved in the  
2 unauthorized removal of property and misuse of company  
3 equipment for personal use while on duty."

4 Below you can see the reference to MOWOR. That's  
5 the Maintenance of Way Operating Rule 1.6 that we talked  
6 about.

7 So what will BNSF say in this case? First, they're  
8 going to tell you that Mr. Koziara didn't make a report  
9 of a work-related injury in good faith. But I'd ask you  
10 to consider this information as you hear all of the  
11 facts. Mr. Koziara reported the injury on September  
12 9th, the day it occurred. BNSF won't dispute that. In  
13 fact, BNSF will bring someone here and admit that an  
14 employee can report an injury precisely how Mike  
15 reported the injury on Thursday, September 9th.

16 You'll also see and hear that at all relevant times  
17 during this two-month period of time, that BNSF treated  
18 the injury as a work-related injury. This is an  
19 internal email of theirs after Mike had been dismissed  
20 where there's a discussion amongst several higher level  
21 employees about how to characterize Mr. Koziara's  
22 dismissal, and the quote I blew up shows "Only theft is  
23 cited as reason for dismissal, nothing for failing to  
24 report an injury."

25 Mr. Veitz will also admit that Mike Koziara got

1 injured on September 9th, 2010. He just doesn't think  
2 Mike broke his leg. But he doesn't dispute that Mike  
3 got injured that day. BNSF though has no evidence that  
4 Mr. Koziara injured his left leg in any other way other  
5 than the way that Mr. Koziara has told -- has testified  
6 to up to this point and what he'll testify to later this  
7 afternoon, which is what I just explained happened on  
8 Thursday, September 9th, at East Winona, Wisconsin.

9 Then BNSF will say well, we would have suspended  
10 Mr. Koziara even if he hadn't been injured. The  
11 discipline notice that we saw says that he's being  
12 disciplined for conduct that resulted in his personal  
13 injury. Uses the word *your*, but he's the recipient of  
14 the notice.

15 Mr. Koziara is the only employee that got injured  
16 on September 9th. Al Mitchell was standing within  
17 several feet of Mr. Koziara when the plank hit  
18 Mr. Koziara and he wasn't charged with any rule  
19 violation. No other person was charged with any rule  
20 violation.

21 So then BNSF will argue that we would have  
22 terminated Mr. Koziara even if he hadn't been injured.  
23 But Mr. Veitz gave Mr. Koziara permission. Now  
24 Mr. Veitz is going to deny that. He's not going to say  
25 that he blessed this. But Mr. Koziara will tell you

1 that he did receive permission from Mr. Veitz, either  
2 the day of or within a day or two prior to the taking,  
3 and then he gives away the twenty switch ties.

4       You're going to hear it happened in the morning in  
5 broad daylight. You're going to hear that the ties at  
6 that point, once they are removed out of the ground and  
7 are sitting in a pile next to the rail, aren't even BNSF  
8 property anymore. They had to be disposed of in some  
9 way. You will hear that Mike didn't keep any of the  
10 switch ties, he gave them away to a farmer friend of  
11 his. He had taken ties before; he was never  
12 disciplined. In fact, BNSF has never disciplined or  
13 terminated another employee for giving away old scrap  
14 ties.

15       Lastly, they're going to say well, Mike had a  
16 chance to appeal the dismissal before a review panel and  
17 they sustained the dismissal and they sustained the  
18 suspension. So what are we doing here? It's a separate  
19 proceeding. It's not this case. You're the deciders of  
20 fact in this case. Mr. Koziara didn't attend a hearing  
21 before the review panel, and it was a review of the --  
22 in part, the investigatory hearings that I've talked to  
23 you about that Mr. Heille presided over.

24       Ladies and Gentlemen, Bob Kramer's words on  
25 September 14, 2010, *this isn't good*, were prophetic.

1 Two months to the day after Mike's injury he's suspended  
2 and fired. Mike brought this lawsuit to challenge the  
3 legitimacy of BNSF's conduct. After 32 years of hard  
4 work and dedication, Mike deserves a fair assessment of  
5 why he was suspended and why he was terminated. This  
6 case is about whether the suspension and the termination  
7 were because he reported a work injury.

8 We're confident that you all will provide that fair  
9 assessment. Thank you very much for your time and  
10 attention. (1:30 p.m.)

11 THE COURT: Thank you. Mr. Douglas.

12 MR. DOUGLAS: May it please the Court.  
13 Counsel. Good afternoon, Ladies and Gentlemen. Just to  
14 remind you, my name is Bruce Douglas and I'm one of the  
15 attorneys for BNSF Railway Company. I look forward to  
16 this opportunity to speak to you today because this is  
17 really one of only two opportunities that I, as an  
18 attorney, get to speak to jurors. I'll get another  
19 opportunity at closing argument. But for the rest of  
20 the trial, you'll only hear me when I'm questioning a  
21 witness or perhaps making an objection. So I do welcome  
22 this opportunity to give you BNSF's perspective on this  
23 case.

24 I'd like to tell you a little bit about our case  
25 and I'm going to tell you some facts that my esteemed



1 colleague, Mr. Morgan, did not tell you. So let me  
2 begin. What do we think this case is all about? We  
3 think this case, first of all, is about danger, we think  
4 it's about honesty, and we think it is about not having  
5 permission to dispose of BNSF's property.

6 Now, let me pause here for a moment to tell you  
7 what this case is not about in our view. This is not  
8 the occasion nor is this case about whether or not  
9 BNSF's decision initially to give Mr. Koziara a 30-day  
10 Level S record suspension. That's a mouthful. I'll  
11 explain that in a moment. Nor is it about whether or  
12 not that decision was fair. It's not about whether the  
13 decision to discharge Mr. Koziara or dismiss him was  
14 fair. Those are decisions that were made by the  
15 railroad and we don't come here today to second-guess  
16 those decisions. Instead, the only questions that have  
17 to be answered are the ones that Mr. Morgan outlined for  
18 you, and that is did Mr. Koziara make his injury report  
19 in good faith and would we have taken the same action  
20 against Mr. Koziara even if he had never filed an injury  
21 report. So it has nothing to do with the fairness of  
22 some of the procedures that you've heard about, and I  
23 will address that.

24 The other thing that I think is important is to  
25 tell you how seriously BNSF takes certain matters. The

1 first thing that it takes very seriously is that it  
2 cares about its employees. The second thing is it wants  
3 employees to work safely. It's the goal of BNSF to  
4 prevent injuries. It's the goal of BNSF to have  
5 employees report to work, to go work -- go about their  
6 work safely, and go home safely at the end of the day to  
7 their families. So yes, BNSF has rules. And we have  
8 about eight inches worth of rule books there.

9 But unlike things like employee handbooks that you  
10 may receive at your job -- and we have a joke in the  
11 field of employment law, both plaintiff's lawyers and  
12 management lawyers, and that is that I've never met an  
13 employee who actually has read the employee handbook  
14 their employer gave them. As employers, we all like to  
15 think that employees read the handbooks. We know that  
16 that's really not case.

17 But the railroad is a different kind of business.  
18 Employees have to read the rule books that they're  
19 given. And there are that many rule books because there  
20 are different what we call *crafts* and *classes* of  
21 employees on the railroad. There are people who drive  
22 the trains; conductors. There are people who work with  
23 locomotives. There are people who lay the tracks, the  
24 maintenances workers; Mr. Koziara's section or division,  
25 the Brotherhood of Maintenance of Way Employes, and

1 there are others who do other types of work on the  
2 railroad. Each of those -- people who work in the yards  
3 where the trains are assembled and switched and put  
4 together, everybody has their own set of rules. These  
5 rules are published. They're circulated to the union.  
6 They're made available. They're available on the  
7 company intranet.

8 But more importantly, as we will show you during  
9 the trial, these rules are studied and tested on every  
10 year and the employees themselves receive operations  
11 tests periodically by their supervisors. We know  
12 they're tested on it because they go online and they  
13 take the courses and they certify that they've read the  
14 rules and they've taken the tests and it goes into their  
15 employee record, which is called an employee transcript.  
16 And we'll show that to you during the trial. So I think  
17 it's unfair for someone to say we're minimizing the  
18 rules that the railroad has and holding up seven inches  
19 or eight inches of rules and saying well, it's a bunch  
20 of paper. It's not just a bunch of paper.

21 The other thing that you weren't told during  
22 Mr. Morgan's opening statement, which is critical, is  
23 that Mr. Koziara for quite awhile, and on the days that  
24 we're going to talk about during this discussion, was a  
25 foreman. Now, he's not a member of management, but he

1 was a foreman. A foreman is a position that you achieve  
2 under the Collective Bargaining Agreement. You bid on  
3 it, you get it on seniority, and based on your  
4 qualifications you become a foreman.

5 Mr. Koziara was the foreman in charge on the two  
6 days in question that we're talking about, September  
7 9th, and what happened the week before. And I'll be  
8 candid with you: Nobody really knows the exact date  
9 that the ties were given away at Winona Junction, but it  
10 happened during the week of August 30th to September  
11 3rd. Everybody agrees on that. We do know the date of  
12 the claimed injury, which was Thursday, September 9,  
13 2010.

14 But Mr. Koziara was the foreman. As the foreman,  
15 he is responsible for overseeing the work. When you're  
16 working on crossings and so forth where train traffic  
17 has to be stopped, he is the person responsible for  
18 making the arrangements for train traffic to be stopped.  
19 You're going to hear about something called a Form B.  
20 It's a procedure by which the train traffic is stopped  
21 while the men are working on the track. He is to be  
22 overseeing the work. But more importantly, as a  
23 foreman, one of his primary duties while he's out  
24 there is to ensure that everybody is a safe distance  
25 away from any equipment and to do the job safely.

1 Now, it is because of how Mr. Koziara conducted  
2 himself on September 9, 2010, that he received a 30-day  
3 Level S record suspension. I'll tell you what that is.  
4 Level S means -- 30-day part everybody gets. Level S  
5 means it's a serious violation of the rules. And the  
6 rules were shown to you by Mr. Morgan in his opening.  
7 It's a record suspension. This is something that many  
8 of you may not be familiar with in your line of work. I  
9 think all of you understand what a suspension is and  
10 then what a dismissal is. In the railroad industry, at  
11 BNSF, sometimes some employees receive essentially a  
12 black mark on their record, but they're not sent home  
13 and they don't lose any pay. That is what a record  
14 suspension is.

15 One of the reasons for that of course has to do  
16 with the fact that it's a unionized environment. You're  
17 dealing with unions and these types of things have been  
18 established by the parties, but also for manpower needs.  
19 It's not always feasible to send somebody home without  
20 pay every time they make a small mistake. This was a  
21 larger mistake, so he received a 30-day record  
22 suspension, and the notice of the suspension would say  
23 to him, if you're found to have violated any more rules  
24 within the next 12 months, the discipline will be even  
25 more serious.

1           So what happened on that date? On September 9,  
2   2010, Mr. Koziara was directing a crew of workers who  
3   were working on a crossing. Mr. Koziara's crew was to  
4   take up crossing planks. Another crew, a tie gang  
5   they're called, was working on the underlying railroad  
6   tracks and the ties that go between the railroad track.  
7   If you know, railroad tracks, you're going to hear  
8   testimony, are about five feet apart and those track --  
9   those ties that are perpendicular laying in the bed of  
10  the truck are called *railroad tries*. The particular  
11  ties that we were dealing with here were crossing  
12  planks.

13           Now what happened to make this dangerous? The  
14  first thing here is we're dealing with a large wooden  
15  crossing plank. I'm going to show you a picture of it  
16  very shortly. These planks, as you will see, are about  
17  nine inches high, about 18 inches wide, and about 16  
18  feet long and they weigh about 1200 pounds. They are  
19  fastened down to the crossing by essentially what are  
20  large wood screws, metal screws, just like you would  
21  fasten wood at home; you know, a little wood screw, you  
22  drill it in, you put some wood, hang it to the wall.  
23  Except that these wood screws can be anywhere from a  
24  quarter-inch to half-an-inch, and they're about 16 to 18  
25  inches long. They're big screws. They don't have a

1 screwdriver head on top. Instead what they have is kind  
2 of a square head and you use a devise that's essentially  
3 a high-powered socket wrench to screw them into the  
4 ground and to take them up. And in order to get the  
5 crossing planks up, you have to remove these things, and  
6 these things are called *lags*.

7       On that day, there was -- Mr. Koziara was the  
8 foreman. He got to the work site and he was told by one  
9 of the people who was working on the crew that there was  
10 a problem with the hydraulic gun. Hydraulic gun is  
11 essentially a great big socket wrench that runs on  
12 hydraulic power. It was broken and the men were trying  
13 to repair it.

14       Mr. Koziara then conferred with the person who was  
15 running the front-end loader, a very large tractor. His  
16 name was Greg Zielke, and we expect that you're going to  
17 hear from Mr. Zielke. And Mr. Zielke and Mr. Koziara  
18 decided, Mr. Zielke proposed it or Mr. Koziara proposed  
19 it, but Mr. Koziara directed him to go ahead and use the  
20 forks of this front-end loader to pry up this plank,  
21 literally to pop it up out of the ground, and that's  
22 what Mr. Zielke was trying to do. The problem with this  
23 is Mr. Koziara was standing only about five to seven  
24 feet away from this near the front of the machine in the  
25 line of fire from where that crossing plank could

1 possibly be popped up, and that, unfortunately for him,  
2 is apparently what happened. He was the foreman and so  
3 forth.

4 This is the motto Burlington Northern has. This  
5 sign that you see here, this is posted on some of the  
6 locations of Burlington Northern; may or may not have  
7 been at La Crosse. But Mr. Rankin, who is going to  
8 testify in this case, will tell you that this particular  
9 sign, which dates back many, many years, is actually  
10 found at the back of his building in Galesburg,  
11 Illinois. That's a philosophy of the company that most  
12 injuries are, in fact, preventable.

13 Now the plaintiff makes light of that. The  
14 plaintiff says that if Burlington Northern thinks that  
15 injuries are preventable, then it really doesn't want to  
16 know about injuries or somehow that is really a bad  
17 thing. It's not a bad thing for an employer to believe  
18 that injuries are preventable and to train people to  
19 work in a safe manner.

20 Now here's the crossing planks that we're talking  
21 about. This is a shot of the crossing planks. This is  
22 actually the crossing at a location called *East Winona*.  
23 Now I'm going to tell you right now that we have two  
24 locations that have the same word in them. It's a  
25 little confusing.



1           The first set of events that I'm going to tell you  
2 about occurred at East Winona. The next set of events  
3 occurred at a place called *Winona Junction*, which is  
4 several miles away. We'll show you a map during the  
5 trial.

6           To give you an idea of the heft, the size of these  
7 crossing planks, as I told you, they're about nine  
8 inches high, 18 inches wide, about 16 feet long. They  
9 weigh about 1200 pounds. They are screwed into the  
10 ground, maybe a little hard to see it, but there are  
11 holes there. They're screwed into the ground with these  
12 lags. And in order to get them up, you have to take the  
13 lags out. As a last resort, if the lags are stuck,  
14 maybe the head is stripped, you can't get them out, then  
15 it is not totally unacceptable to use the front-end  
16 loader to pop them up. But as you will hear from the  
17 BNSF witnesses, that's really a last resort, and when  
18 that is done, it has to be done very, very carefully.

19           Now you heard about reenactments. My esteemed  
20 colleague suggested to you these reenactments are some  
21 type of a sinister thing that goes on. Not so. Every  
22 time there's an incident, whether it involves damage to  
23 property, whether it involves injury to an employee on  
24 the job, there is performed by the supervisor as quickly  
25 as possible a reenactment. And a reenactment is exactly

1 what it sounds like. You assemble the people who were  
2 out there, you assemble the equipment that was out  
3 there, you get everybody to tell you how it was lined  
4 up, and then you take a photograph like this and you  
5 write a report. And we'll show you the entire report  
6 which consists really of just one slide in a PowerPoint  
7 presentation.

8 Mr. Veitz, the supervisor, his title was roadmaster  
9 at this time and he's now retired from the company, but  
10 you'll hear from him; went out and took this picture.  
11 Now if you see the gentleman standing off to the right  
12 in front of the front-end loader, that actually isn't  
13 Mr. Koziara. He was not there that day. He was  
14 unavailable because of his injury; he had claimed  
15 injury. He was off work.

16 This is another employee by the name of Brad  
17 Underhill standing in for him. Sitting in the cab is  
18 Mr. Zielke, the front-end loader operator. These are  
19 the forks that were being used to pop up the plank.  
20 Where the forks are touching that particular plank,  
21 that's the plank that came up and that's probably the  
22 same plank that Mr. Koziara says flew over the crossing  
23 and struck him in the left leg.

24 The only thing that might be different, Mr. Koziara  
25 does not think he was standing inside the track. He

1 thinks he may have been standing about 12 inches back  
2 just on the other side of the track. Okay?

3 This is what the thing looked like on the day in  
4 question. This is what Mr. Veitz learned during the  
5 construction of the reenactment. Okay.

6 For that incident, Mr. Koziara received a notice of  
7 hearing to report for an investigation. Now I'll tell  
8 you something that will come out in the evidence, we  
9 expect it will come out in the evidence is this: These  
10 investigations are governed by rules, not necessarily  
11 BNSF's rules, they're governed by rules in the  
12 Collective Bargaining Agreement with the union. There  
13 is a rule, Rule 40, and we'll show it to you during the  
14 case, and it specifies the timeline for conducting these  
15 investigative hearings that you've heard about. The  
16 investigative hearing has to be held within fifteen days  
17 after the incident. The employee has to receive at  
18 least five days advance notice, written notice of the  
19 hearing, and the union does as well.

20 So the reason for the apparent haste to conduct the  
21 hearing, the investigative hearing, are these timelines  
22 are very strict under the Collective Bargaining  
23 agreement, and that's how the hearings are held.

24 Now, you heard some material -- you've heard some  
25 information from Mr. Morgan that says well, these

1 hearings aren't very fair. These hearings aren't fair  
2 because they're conducted by a BNSF person, in this case  
3 Mike Heille, who happens to be in the Maintenance of Way  
4 Department down in Illinois, and he conducts a lot of  
5 hearings for the division that he works in.

6 It's not fair because Mr. Koziara didn't have a  
7 lawyer. He didn't have the opportunity to subpoena  
8 people. He didn't have the opportunity to do this or  
9 that. Although the fairness of that hearing is really  
10 not the point because that's an investigative hearing  
11 conducted by BNSF to decide what discipline to impose,  
12 first of all, Mr. Koziara was represented at the hearing  
13 by his union representatives. In the first hearing, he  
14 was represented by Mr. Chris Davis, who you will hear  
15 from, we expect you'll hear from in this case. At the  
16 second hearing at his dismissal, he was represented by  
17 both Mr. Davis and Don Willing, who was the Local  
18 chairman. You've heard that name already because he's  
19 the gentleman that Mr. Koziara consulted with about  
20 whether to file a personal injury report.

21 The hearings are not under oath, but they are  
22 transcribed, just as what's happening in this courtroom.  
23 There's an audio recording made and a transcript, and  
24 after that the transcript, and any exhibits that anybody  
25 wants to put in, is typed up and it's sent to the person

1 who is going to make a decision as to what to do with  
2 the employee. Was there a rules violation.

3 The investigation had nothing to do with how the  
4 injury occurred. It was not an investigation into the  
5 injury. It was not -- it wasn't the Star Chamber. It  
6 was an investigation for the purpose of finding out if  
7 rules were violated, how they were violated, could it  
8 have been prevented, how can it be prevented in the  
9 future. The outcome of these reenactments in  
10 determining what happened at a particular site is very  
11 important for BNSF because they use that information as  
12 a teachable moment and they talk about it in safety  
13 meetings that are held on almost a weekly basis with  
14 everybody in the section or the department or the  
15 division. So they might say look what happened out at  
16 East Winona last week. Don't do it that way again  
17 because it wasn't the best practice to do in the first  
18 place.

19 All right. The next incident that occurs -- and  
20 this is something BNSF doesn't learn of until after the  
21 time that Mr. Koziara reports his injury. BNSF comes  
22 into information that perhaps Mr. Koziara may have been  
23 injured at another time, in another place. They find  
24 out that the week before, Mr. Koziara was seen by his  
25 co-workers hopping around on one foot at Winona Junction

1 because he had either stepped off or fallen off two  
2 trailers containing switch ties. Mr. Veitz knew nothing  
3 about any of that.

4 Mr. Veitz contacted the BNSF Police Department.  
5 Yes, BNSF has its own police department. It's a very  
6 large system. The tracks are all over the place, and  
7 they have their own police officers. They're not  
8 certified police officers that make arrests outside, but  
9 they are police officers nonetheless who are trained to  
10 investigate; and they particularly deal with issues of  
11 theft of property that is located on the BNSF property,  
12 whether it's BNSF's property, whether it's an employee's  
13 property, whether it's a contractor's property.

14 And what was discovered was that the week before,  
15 Mr. Koziara was directing a crew repairing switch ties,  
16 repairing a crossing -- they were removing some switch  
17 ties. Switch ties I will show you in just a minute.  
18 They happen to look almost exactly like really nice  
19 landscaping ties that you might be able to buy at  
20 Menards or Lowes or something like that. Mr. Koziara  
21 decided to give away about twenty of those switch ties  
22 to a local farmer, friend of his by the name of Russ  
23 Hicke. Mr. Hicke unfortunately is deceased so we can't  
24 call him at this trial.

25 Mr. Koziara did not have permission to give away

1 that property. Now, Mr. Koziara will offer you all  
2 sorts of explanations for why it's okay to give away the  
3 property or that at one time people could get permission  
4 to give away the property. But you will also hear  
5 evidence in this case that it is the custom and a  
6 longstanding practice at BNSF that if an employee was,  
7 in the old days, was given ties or permission to take  
8 ties, he also had to get a written release to take them.  
9 And if there wasn't a written release in the old days,  
10 verbal permission was okay. But BNSF cannot think and  
11 it has no information on anyone ever doing this on  
12 working time, using company equipment, and, you know,  
13 using company personnel on the clock. And that's what  
14 Mr. Koziara did. And that's why he was fired: For the  
15 theft, for misusing company property, for misusing  
16 company personnel on the clock.

17 These are what switch ties look like. They come in  
18 various lengths. They can be 16 feet, 24 feet, et  
19 cetera.

20 The reason that employees were not given permission  
21 in 2010 any longer, and you'll hear evidence of this, to  
22 either purchase or take ties is that these railroad ties  
23 are creosote. They have to be disposed in an  
24 environmental friendly manner, and that means that BNSF,  
25 if the ties are really no good for anything, they're

1 ground up and then they're incinerated. They're sent  
2 off for that purpose. And yes, BNSF may have to pay  
3 people to do that, but that's the way these ties under  
4 the law have to be disposed of.

5 Now here is the other thing you weren't told in the  
6 -- in Mr. Morgan's opening statement. Now he said to  
7 you -- if I may use the document camera, Your Honor?

8 THE COURT: Sure.

9 MR. DOUGLAS: One of the things Mr. Morgan said  
10 to you a little while ago was that we wouldn't -- we  
11 wouldn't dispute that Mr. Koziara was injured on  
12 September 9th. We do dispute that he was injured in the  
13 way and to the extent that he claims on September 9th.  
14 There may be evidence to show that the plank struck him,  
15 but we don't believe that the actual break took place on  
16 that date. So where it says "BNSF has no evidence that  
17 Koziara injured his leg in any other way," here is what  
18 you weren't told.

19 Mr. Koziara is the one who created the other  
20 evidence of this. When he was at the doctor's office on  
21 Monday, September 13th, as soon as he found out from the  
22 x-ray report that he had a fractured tibia, he got on  
23 the phone and called two of his co-workers, Brad  
24 Underhill and Charlie Arentz, and told them that he had  
25 been injured at home over the weekend. And what he told



1 them was he had been working on the plow of his ATV and  
2 the plow fell on his leg. That's what he told them.

3 He then made a call to Don Willing, his union  
4 chairman. He then, after talking to Mr. Willing, made a  
5 call to his lawyer. After makes those calls, he then  
6 called back Mr. Underhill and Mr. Arentz and said  
7 essentially just kidding, it didn't happen that way. I  
8 wasn't injured at home. And then after making those six  
9 telephone calls, he finally calls his supervisor,  
10 Roadmaster Veitz. He didn't speak to him that day, but  
11 he did speak to Roadmaster Veitz the next morning.  
12 Mr. Veitz was up in Hager dealing with a derailment. He  
13 got a call at about quarter to seven in the morning, and  
14 his immediate reaction was, as he will tell you, he  
15 wanted to know why he hadn't been told of that injury  
16 sooner.

17 Mr. Koziara explained it to him. Mr. Veitz said,  
18 "Well, get that report filed as soon as possible."  
19 Mr. Koziara told him "I won't be able to do it today  
20 because I'm out on union business." And Mr. Veitz said,  
21 "Get it filed as soon as possible." Mr. Koziara then  
22 filed the report later that day.

23 It has been suggested to you that somehow  
24 Mr. Koziara was afraid of filing the report.  
25 Mr. Koziara may have been afraid of filing a late

1 report. He wasn't afraid of filing a report. As a  
2 matter of fact, he will tell you in his testimony that  
3 on September 9, 2010, if he had wanted to file the  
4 report that afternoon when he verbally told Don Jones  
5 about the alleged injury, he had the report forms in his  
6 desk. He could have filed one any time he wanted. And  
7 in fact, in this case Mr. Koziara was never charged with  
8 filing a late report and he was never disciplined for  
9 filing a late report.

10 We will submit to you, Ladies and Gentlemen, that  
11 this whole issue about being afraid of filing a late  
12 report is a red herring because Mr. Koziara then again  
13 changed his story. And you will have -- you will hear  
14 this, from going from the injury didn't happen over the  
15 weekend when the plow fell on me to actually the plow  
16 fell on me, but it landed on my right toe.

17 It is Mr. Koziara who's created this doubt. It is  
18 Mr. Koziara, who on his own, for whatever reason, has  
19 come up with these alternating stories.

20 We will show you in this case why Mr. Koziara was  
21 let go. You've seen these rules before. The rules  
22 indicate dishonesty. BNSF will show you that it was  
23 dishonest of Mr. Koziara to give away the ties and give  
24 away the property. We will show you that the ties were  
25 BNSF's property. But at the end of the day, even if

1 they weren't BNSF's property, they surely were not  
2 Mr. Koziara's property to give away.

3       There is also a rule in the MOWOR rules, 1.25, that  
4 says in very plain language you cannot give away the  
5 property of the company. Mr. Koziara wasn't charged  
6 with that rule, but Ladies and Gentlemen, I submit to  
7 you that this rule is about the same as the signs that  
8 you see in a bathroom at a restaurant that tells the  
9 employees to wash their hands before they go back to  
10 work. I'm sure you've all seen those signs and I'm sure  
11 you've all asked yourself why is that necessary, to tell  
12 somebody they have to wash their hands before they go  
13 back in the kitchen. Is it really necessary to tell  
14 people not to steal company property? Well, apparently  
15 it is.

16       This is what the plow looked like. You'll hear  
17 evidence that the plow was a Sun Country plow. It's  
18 about five feet wide, foot-and-a-half or so tall.

19       This is not Mr. Koziara's ATV. It's another one we  
20 got a picture of off the internet. And there's an  
21 example of the plow.

22       Ladies and Gentlemen, we will tell you this case is  
23 about danger, it's about honesty or the lack of honesty,  
24 and it's about not having permission to give away the  
25 railroad's property. I will also tell you that it is

1 for BNSF, and I'm sure you will hear this from the  
2 employees that will come and talk to you, some of whom  
3 are retired, some of whom are still employed, it is  
4 indeed a very sad day when a 32-year veteran of the  
5 railroad is dismissed for theft.

6 But I submit to you, Ladies and Gentlemen,  
7 Mr. Koziara has no one but himself to blame for his  
8 predicament. Thank you for your time. (1:59 p.m.)

9 THE COURT: All right. We'll just take a break  
10 while we're standing here in place so we can move the  
11 podium out of the way so that the plaintiff can prepare  
12 to call his first witness.

13 MR. MORGAN: Thank you, Your Honor.

14 THE COURT: Jury can stand up for a moment if  
15 you want to.

16 (Pause)

17 THE COURT: All right. Mr. Morgan.

18 MR. MORGAN: Thank you, Your Honor.

19 THE COURT: You may call your first witness.

20 MR. MORGAN: Thank you. Plaintiff calls  
21 Michael Koziara, himself, to the stand.

22 **MICHAEL KOZIARA, PLAINTIFF, SWORN,**

23 DIRECT EXAMINATION

24 BY MR. MORGAN:

25 A I'm ready.

MICHAEL KOZIARA - DIRECT

1 Q All right. Would you introduce yourself, please.

2 A My name is Michael James Koziara.

3 Q And how old are you?

4 A Just turned 55.

5 Q You had a birthday this past Saturday; is that  
6 right?

7 A That's correct.

8 Q Happy birthday.

9 A Thank you.

10 Q Are you employed?

11 A No, I'm not.

12 Q When were you last employed full time?

13 A In the fall of 2010.

14 Q What happened in the fall of 2010?

15 A I had an injury at work and I was terminated from  
16 the railroad.

17 Q And when you say *the railroad*, what railroad were  
18 you employed by in the fall of 2010?

19 A Burlington Northern Sante Fe Railroad.

20 Q BNSF?

21 A BNSF.

22 Q You may want to see, Mike, if you can pull the  
23 microphone a little closer to you.

24 A BNSF.

25 Q All right. That works.

MICHAEL KOZIARA - DIRECT

1 Prior to your termination in the fall of 2010, how  
2 long were you employed by BNSF?

3 A 32 years.

4 Q Could you just generally describe the nature of the  
5 work that you did over the 32 years. Just big picture  
6 for us, please.

7 A Big picture. In the early part of the years, I was  
8 a laborer and I was on tie crews and rail crews that we  
9 placed rails and the infrastructure of the railroad, tie  
10 removal repair. And then in the later years, like in  
11 the 80s and 90s, I became a foreman and I also became a  
12 certified welder for the railroad. And I welded rails  
13 back together and certain rail components.

14 And in my last several years with the railroad, I  
15 was a track foreman.

16 Q And how many years roughly did you perform as a  
17 track foreman?

18 A I got my rights back in 1990. Up until 2010. So I  
19 had twenty years in.

20 Q Were you a member of BNSF management?

21 A No, I was not.

22 Q Are you married?

23 A I am married, yes, for 25 years to my wife Joan,  
24 who is not here anymore.

25 Q But she was seated here earlier?

MICHAEL KOZIARA - DIRECT

1 A She was.

2 Q And do you have any children?

3 A We have two step -- I have two stepchildren, Emily  
4 and Kelly Ladone (ph), and they're both 36 years old.

5 Q Twins.

6 A Twins. We're empty nesters now.

7 Q And where did you live, Mr. Koziara?

8 A I live in Holmen, Wisconsin, about 50 miles north  
9 of La Crosse, if anybody is familiar with that.

10 Q You were born and raised in Wisconsin?

11 A Yes, I was.

12 Q Where did you grow up?

13 A I grew up in La Crosse, Wisconsin.

14 Q Did you graduate from high school?

15 A Yes, I did. Central High in La Crosse.

16 Q And what year did you graduate?

17 A 1978.

18 Q What did you do after you graduated from high  
19 school?

20 A I went to a technical college for auto body and gas  
21 welding, and then six months after that I got a job on  
22 the railroad in August of 1978.

23 Q And what railroad did you get hired by?

24 A Burlington Northern Santa Fe or actually at that  
25 time it was Burlington Northern.

MICHAEL KOZIARA - DIRECT

1 Q At some point did the company merge with another  
2 railroad?

3 A They did in '95 or '94/'95, somewhere in there.

4 Q Fair to say from August of '97 until November of  
5 2010 you worked for Burlington Northern?

6 A Sante Fe.

7 Q Or Sante Fe. Burlington Northern Sante Fe.

8 A Right.

9 Q Do you hold or did you hold any certifications  
10 while you were employed by BNSF?

11 A I was a certified welder.

12 Q And did you receive any higher education post-high  
13 school while you were employed by the railroad?

14 A Yes, I did. I actually had some computer training  
15 at UW-L, but I did -- most of my higher education came  
16 from the railroad. They sent me to Johnson Community  
17 College down in Kansas City, Kansas for track  
18 maintenance and welding.

19 Q Excuse me. Go ahead.

20 A And welding.

21 Q You touched on this a little bit already, but it  
22 sounds like the first ten years or so of your career you  
23 worked as a laborer for the railroad?

24 A I worked on a lot of mobile gangs, mobile crews. I  
25 was all over from Chicago to Kansas City and parts of

MICHAEL KOZIARA - DIRECT



1 Illinois. So I was everywhere.

2 Q Just generally describe the nature of the work.  
3 When you say you were working on mobile crews or mobile  
4 gangs from here to Chicago to Kentucky, what sorts of  
5 work are you doing? What are you doing on a day-to-day  
6 basis?

7 A Day-to-day basis was tie removals, rail steel  
8 removals. I was operating mostly machinery that would  
9 pull spikes or tamp ties or something that would put,  
10 you know, we'd take out, remove, and then put it back  
11 together so it was serviceable track.

12 Q And what did you do after the laborer work?

13 A About the late 80s I got into the welding  
14 department, started doing more. I guess I just got more  
15 into the track maintenance. Foreman. I was one of the  
16 older guys. Again, you're starting to get up there in  
17 age and you started to use your experience to, you know,  
18 get yourself promoted or, you know, you get more pay if  
19 you take a higher position.

20 Q So you did welding for a period of time and then  
21 transitioned to foreman in the early 90s?

22 A That's correct. I did both in the early 90s.

23 Q And just briefly describe what it means to be a  
24 foreman of a work crew for BNSF.

25 A Depending what you were running, if I was running  
MICHAEL KOZIARA - DIRECT

1 one of the big gangs or so, you would be in charge of  
2 maybe 50 to 100 men. Sometimes if you were in, like, a  
3 small section like I was at the last part, you were in  
4 charge of maybe four or five guys or you supported a  
5 gang that was in 50 or 100 men. So there was a lot of  
6 people you were in charge of. You made sure everything  
7 was safe. You gave briefings and made sure that  
8 everything was where it was supposed to be.

9 Q And you've referred a couple of times to the term  
10 gangs.

11 A Gangs, that's correct.

12 Q What's a gang?

13 A Gangs are the same as a work crew. We just call  
14 them gangs, but they're actually like a tie crew  
15 removal. They're the ones that came in and removed all  
16 the ties. There's rail gangs. There's rail grinding  
17 trains. There's all sorts of different things to do  
18 every day.

19 Q Did you like working for the railroad?

20 A I did.

21 Q What did you enjoy about it?

22 A I enjoyed being outside, different things to do.  
23 It was a change every day. It wasn't just -- every day  
24 you didn't do the same thing. You know, if there was a  
25 tree fell on the tracks, you went out and got the tree

MICHAEL KOZIARA - DIRECT

1 off the tracks. You know, it was just -- you were in  
2 charge of maintenance. So it was challenging.

3 Q Were you also a member of a union during your  
4 employment at BNSF?

5 A Yes, I was.

6 Q And what union were you a member of?

7 A I was a member of the Brotherhood Maintenance of  
8 Way Employees, division of the Teamsters.

9 Q And did you hold any leadership position for the  
10 union during your time at BNSF?

11 A Yes, I did. I was, at the time, I was our  
12 president of our Local, and I was also the Legislative  
13 Director for the Rail Division of the Teamsters for the  
14 State of Wisconsin. That was an elected position.

15 Q Was that in 2010 when you were terminated, did you  
16 hold those positions?

17 A Yes, I did.

18 Q Okay. And what did you do in the legislative  
19 position?

20 A Legislative positions, I would come to either  
21 Madison or DC and we would -- I would lobby on safety  
22 bills due -- to help the employees or the State of  
23 Wisconsin, anybody that we would affect along the  
24 right-of-way. I got us a couple bills passed  
25 successfully into law, so I was proud of myself for  
MICHAEL KOZIARA - DIRECT

1 that. I was active.

2 Q You were employed with BNSF in the August/September  
3 2010 time frame; is that right?

4 A That's correct.

5 Q What position did you hold during those  
6 August/September 2010 months?

7 A I was a section foreman at Winona Junction.

8 Q All right. So section foreman. Winona Junction.

9 A Yes.

10 Q And what is Winona Junction?

11 A Winona Junction is where Highway 35 and Highway 54  
12 meet as it goes over to Winona. There's a depot right  
13 there at the bottom of the tracks or the hill there,  
14 right -- you've got to cross the bridge and that's where  
15 the depot was.

16 Q And was that -- and you said section foreman. What  
17 does a section mean?

18 A Section foreman means you were in charge of a  
19 section, a crew of men. It could be anywhere from three  
20 to five guys and you were in charge of a territory that  
21 would run from like Trempealeau, Wisconsin all the way  
22 up to like Nelson is what I was in charge of. It was  
23 double mains. It was about 100 miles of track.

24 Q And any issue that arose in that 100 miles worth of  
25 track your crew was asked to help fix?

MICHAEL KOZIARA - DIRECT

1 A That's correct. Or if there was an adjoining  
2 section that needed help, we would go and help them too.  
3 They could send us anywhere if they really wanted to.

4 Q So focusing in on the August/September 2010 time  
5 frame, give the jury a typical day for you in terms of  
6 where you started the day and what you did next, all the  
7 way through to the afternoon. Just generally speaking.

8 A Generally speaking we would meet at the section  
9 house in the morning at seven o'clock. We would wait  
10 for the conference call where we would talk to the  
11 roadmaster in charge, and then after he'd give us, ask  
12 us what we were doing for the day, then the dispatcher  
13 would come on because he'd want to know where we were  
14 going to be so he could give us our track authorities.

15 We would -- whatever we had doing that day, that's  
16 where we'd go. We'd get the job done, and then debrief,  
17 come home, and then we were done for the day. At the  
18 same time, we worked generally from seven to three, and  
19 that was a day.

20 Q Okay. Did the company have rules that the  
21 maintenance workers like yourself and your co-workers  
22 out in the field had to follow?

23 A Yes.

24 MR. MORGAN: Would you call up Exhibit P5,  
25 please.

MICHAEL KOZIARA - DIRECT

1 Q Do you recognize P5?

2 A I don't think this thing works.

3 THE COURT: Hold on, I'll take care of that.

4 THE WITNESS: There it is. It's a little  
5 fuzzy.

6 THE COURT: That I can't help you with.

7 Q I'm not sure I can either.

8 A Okay. Yes.

9 Q Okay. And what is P5?

10 A P5 is the Maintenance of Way Operating Rules.

11 MR. MORGAN: I would offer P5, Your Honor.

12 THE COURT: Any objection?

13 MR. MORGAN: No objection.

14 JUROR THOMPSON: We don't have anything.

15 THE COURT: You're going to get the rhythm of  
16 this very shortly. But after they offer it and there's  
17 an objection that gets ruled on or no objection, then  
18 this will happen and you'll see it. There you go.

19 MR. MORGAN: Is everyone able to see it now?

20 THE COURT: Yep. And if you're wondering, you  
21 can check the gallery monitor. Can you see that.

22 MR. MORGAN: Thank you.

23 BY MR. MORGAN:

24 Q Are you familiar with the Maintenance of Way  
25 Operating Rules?

MICHAEL KOZIARA - DIRECT

1 A Yes, I am.

2 Q Is this one of the sets of rules you were required  
3 to follow?

4 A Yes, we are.

5 Q Were you expected to know the Maintenance of Way  
6 Operating Rules?

7 A Yes, I was.

8 Q Were you trained on them?

9 A Yes, we were.

10 Q Did you follow them?

11 A Yes, I did.

12 Q I want to switch gears a little bit and talk about  
13 the hierarchy of employees that you worked with,  
14 starting with the crew or gangs of employees. Those are  
15 -- those are the maintenance workers like yourself; is  
16 that right?

17 A That's correct.

18 Q Okay. And then there are various types of gangs or  
19 work crews; right?

20 A Yes, there are.

21 Q You've identified some of them, the tie gang for  
22 instance?

23 A Right. That would have like a foreman, an  
24 assistant foreman on it because there was more than one  
25 guy could handle, so they would have an assistant

MICHAEL KOZIARA - DIRECT

1 foreman to help that. The foreman used to take care of  
2 just protection of the gang to make sure wherever you're  
3 working you were not getting run over by the trains.

4 Q How does a person become a foreman or an assistant  
5 foreman?

6 A You have to have a year's track experience first  
7 and then if you qualify with your seniority, you can get  
8 that job.

9 Q And the foreman position is the position you held  
10 in August/September of 2010?

11 A That's correct.

12 Q And then is there a first level of management that  
13 the crew members, including the forepersons, report to?

14 A Yes. If the gang was big enough, they would have  
15 an assistant roadmaster on it. The gang would answer to  
16 him first. And then the roadmaster was in charge of the  
17 territory. He would be the -- he would be actually the  
18 guy that -- whatever his territory is, like La Crosse to  
19 Prescott was our territory under Mike Veitz, so he would  
20 even have to answer to him. So that's how it would  
21 work. And then it goes on from there to division  
22 engineer and on up.

23 Q And in terms of the breakout of the company, is the  
24 company broken into divisions?

25 A Yes, they are.

MICHAEL KOZIARA - DIRECT



1 Q What division is Wisconsin in, do you know?

2 A We're in the Chicago Division.

3 Q And is there a division that Wisconsin is?

4 A Yes. We were in District 500.

5 Q And I think you mentioned this. You had  
6 responsibility for a track, at least as a foreman of a  
7 work crew, for a track in Wisconsin.

8 A That's correct.

9 Q And Mr. Veitz was your roadmaster in  
10 August/September of 2010?

11 A Yes, he was.

12 Q Were there other roadmasters that you had the  
13 occasion to work with during that time frame other than  
14 Mr. Veitz?

15 A Yes, there was.

16 Q How did that work where you would work with a  
17 roadmaster other than Mr. Veitz?

18 A If I was -- if there was another roadmaster, if I  
19 had to work with him, Mr. Veitz would instruct me to  
20 work with that crew, with that roadmaster, and he would  
21 be my supervisor at the time, my immediate supervisor.  
22 I would switch to whoever it was.

23 Q What sorts of specific work were your crews doing  
24 in that August/September 2010 time frame?

25 A We were supporting the tie gangs. There was a mini  
MICHAEL KOZIARA - DIRECT

1 tie gang and a large tie gang.

2 Q Okay. So there's a mini tie gang and a large tie  
3 gang. How many crew members make up or comprise  
4 generally a mini tie gang?

5 A Six people.

6 Q And then how about the larger regular-sized tie  
7 gangs?

8 A Anywhere from 30 to 50.

9 Q Okay. And the mini tie gangs, generally what are  
10 their responsibilities? What do they do with the ties?

11 A The mini tie gang came out and they were just  
12 taking out the switch ties in front of the big tie gangs  
13 so they didn't slow them down at all.

14 Q Okay. So let me stop you there. And we saw it in  
15 Mr. Douglas's opening. I'm not sure if we did. Yeah, I  
16 believe we did see switch ties; is that right?

17 A That's correct, we saw switch ties.

18 Q So just briefly describe what a switch tie is and  
19 how it's used on the track.

20 A Switch ties are made of wood and they're basically  
21 there to -- so when you go from one track to the other  
22 track, the switch ties are longer, so it goes through  
23 the switch so we've got something so the train can run  
24 over it with one tie or one piece of wood.

25 Q So the mini tie gang was responsible for replacing  
MICHAEL KOZIARA - DIRECT

1 or removing switch ties?

2 A That's correct.

3 Q Okay. And then the other set of tie gang or tie  
4 crews is just the regular tie crew; right?

5 A Right. They came in and very rarely did they do  
6 switch ties, but if they did, there was a few of them.  
7 We also took care of that too.

8 Q And what was their primary responsibility, the  
9 regular tie gang?

10 A Their primary responsibility is just to take out  
11 the track ties.

12 Q Just give the jury some comparison between the size  
13 of a switch tie as opposed to a regular track tie.

14 A A regular track tie is eight foot six inches long  
15 and a switch tie can run anywhere from nine feet to  
16 twenty-four feet long.

17 Q And can you just generally describe how the tie is  
18 removed from the track?

19 A Well, first you have to pull the components off it,  
20 like spikes or lags, whatever was holding the tie down.  
21 Then there would be a machine that would come along and  
22 they'd tear it out with what's called the *tie inserter*.  
23 They would take it out with it. That tie inserter would  
24 put another tie back in it. They'd come along, they'd  
25 plate it, replat it, and then they'd respike it again

MICHAEL KOZIARA - DIRECT

1 or refasten it, whatever had to be done.

2 Q Do ties get worn down?

3 A Yes, they do.

4 Q Do they become useless at some point?

5 A Yes, they do.

6 Q And they have to be replaced?

7 A Yes, they do.

8 Q Is that the same with regard to switch ties?

9 A Yes, they do.

10 Q Okay. So both switch ties and track ties get worn  
11 down.

12 A Yes, that's correct.

13 Q And have to be replaced.

14 A Yes.

15 Q And that's one of the purposes of the tie gangs,  
16 both the regular size tie gang and mini tie gang, to  
17 replace those ties?

18 A That's correct.

19 Q Where generally, once the ties are -- whether  
20 they're switch ties or regular track ties, once they're  
21 taken out of the ground, where are they placed?

22 A They're placed alongside the tracks usually.

23 Q And what happens to them after they're placed  
24 alongside the tracks?

25 A They're usually picked up by contractors.

MICHAEL KOZIARA - DIRECT

1 Q Are those the regular ties or the switch ties or  
2 both?

3 A Both. It just depends on how many there are. If  
4 there's a small amount, we usually pick them up and  
5 throw them in a pile. Otherwise the contractors -- if  
6 they're regular ties, the contractors will pick them up  
7 and put them on their trucks.

8 Q Mr. Koziara, in your 32 years at BNSF, have  
9 employees taken old worn out track ties?

10 A Yes, they have.

11 Q You, as well as other employees that you know of?

12 A Yes.

13 Q Both switch ties and track ties?

14 A Yes.

15 Q Aside from the -- well, let me ask you this: In  
16 total how many times have you taken either switch ties  
17 or track ties from BNSF?

18 A I think about three times.

19 Q And other than the incident at Winona Junction that  
20 we'll talk about, those two previous times, were you  
21 ever disciplined for taking ties?

22 A No, I was not. I got permission.

23 Q And who did you get permission from?

24 A Mike Veitz.

25 Q And how recent was -- were the previous two times  
MICHAEL KOZIARA - DIRECT

1 that you had taken the ties?

2 A I believe one was earlier in the year.

3 Q Earlier in 2010?

4 A Yes. Out at what we call *the milepost*. It's about  
5 four miles from Winona Junction. It was way out at the  
6 end of the road where it ends, there was ten ties out  
7 there. I asked him for them. He said no problem, get  
8 them out of there.

9 Q Did you have to talk to a contractor?

10 A No, I did not.

11 Q Did you have to fill out a form?

12 A No.

13 Q Sign a release?

14 A No.

15 Q You just got permission from your supervisor;  
16 right?

17 A That's correct.

18 Q And how about the other time?

19 A That was a long -- that was a little bit longer  
20 ago. We were in the yards. There was a few ties. He  
21 said go ahead. Grab some. Anybody could get them if  
22 they wanted them. He just wanted them out of the yards.

23 Q Who's he?

24 A That was Mike Veitz. I'm sorry.

25 Q When you say a while ago, could you --  
MICHAEL KOZIARA - DIRECT

1 A I'm talking 1989. I remember I took some, other  
2 guys loaded their pickup trucks full with a tie crane  
3 and loaded their trucks and got them out of there.

4 Q Have you witnessed other employees loading ties,  
5 aside from that instance in the late 80s, in the last  
6 several years prior to your termination, did you  
7 personally observe employees taking ties?

8 A I didn't personally observe it, but I know they  
9 took them from the hospital down there too, Luther  
10 Hospital. There was a bunch of ties there that some of  
11 the guys took home.

12 Q Have you ever heard of anyone being disciplined for  
13 taking ties?

14 A No. Nobody.

15 Q Do you recall -- do you recall the twenty switch  
16 ties that were taken and then given away at Winona  
17 Junction?

18 A Yes, I do.

19 Q Do you remember what day that occurred?

20 A I believe it was like August 30th.

21 Q Of 2010?

22 A Of 2010, that's correct.

23 Q You don't deny taking the ties, do you?

24 A No, I do not.

25 Q And why did you take the ties?

MICHAEL KOZIARA - DIRECT

1 A Because I asked for the ties and I got permission  
2 to take them. So at the time, we were short on a track  
3 window, which we had so much time to take those ties out  
4 of that switch. He gave -- we were supposed to have  
5 five hours, he gave me three hours. And I --

6 Q When you say he gave you three hours, who are you  
7 referring about?

8 A I'm sorry. I'm saying the dispatcher gave us so  
9 much time to take the ties out. We were supposed to  
10 have more time. We did not get more time. So I  
11 utilized getting that -- that time was to get the ties  
12 and it helped us get the track window done sooner by not  
13 having to load ties and drive them all the way down to  
14 East Winona two miles away. So we got rid of the twenty  
15 ties on the trailers and away they went.

16 Q Let's just back up for a second. What condition  
17 were the switch ties in that day, the twenty switch  
18 ties?

19 A They were scrap. They were just cracked and just  
20 scrap.

21 Q Were they able to be used on the railroad track?

22 A No, you can't put those back in the railroad tracks  
23 again.

24 Q And where were the twenty ties sitting?

25 A They were in -- we were picking them out of the  
MICHAEL KOZIARA - DIRECT



1 switch. Greg would go in and get them with the loader.

2 Q Greg Zielke?

3 A Greg Zielke would go get them with the loader, come  
4 back out, and loaded the trailers up with them.

5 Q And who did you get permission from to take the  
6 ties?

7 A Mike Veitz.

8 Q And when did you receive permission from Mr. Veitz?

9 A It was either that day or the day before. I'm  
10 pretty sure it was the day before.

11 Q You're aware Mr. Veitz denies giving you  
12 permission; right?

13 A I think he doesn't remember if he doesn't write it  
14 down, so yes.

15 Q Was it during -- were you in person with Mr. Veitz?  
16 Was it over the phone? Was it in writing?

17 A It was over the phone.

18 Q And was anyone else on the phone call other than  
19 you and Mr. Veitz?

20 A Mr. Zielke was in the room, but he doesn't remember  
21 when I handed the phone to him after I was done talking  
22 to Mr. Veitz. I thought he had heard the conversation,  
23 so -- but no, that was about as best I could get.

24 Q Were there more ties there that day?

25 A There was eighty ties that day or more taken out.

MICHAEL KOZIARA - DIRECT

1 Q And why did you only take twenty?

2 A Because that's all I had permission for and that's  
3 all that would fit on the trailer anyways.

4 Q Did you keep any of the twenty switch ties?

5 A No, I did not.

6 Q What did you do with them?

7 A I gave them to the farmer.

8 Q Who is the farmer?

9 A Mr. Hicke.

10 Q Is he a friend of yours?

11 A Yes, he was.

12 Q Okay. And did Mr. Hicke make a request of you?

13 A He told me if I ever had a chance to get some ties,  
14 let him know. So I did.

15 Q Did you make any money off of the giving away of  
16 the ties to Mr. Hicke?

17 A No.

18 Q When did you -- when was the work being performed,  
19 this three-hour window? Was it at night in darkness or  
20 was it in the daylight?

21 A It was in the daylight. It started off early in  
22 the morning, eight or nine o'clock, somewhere in there  
23 after my Form B started.

24 Q And what is Form B?

25 A Form B is a form of protection which gives you  
MICHAEL KOZIARA - DIRECT

1 certain things from milepost to milepost. Before a  
2 train can pass that milepost, they have to ask me  
3 permission first. So they cannot go past a certain  
4 point.

5 Q Why is that?

6 A That's so we can work in a spot and not have to  
7 worry about getting run over by the train.

8 Q Because workers are out on the track.

9 A That's correct.

10 Q Okay.

11 A I was in charge of their safety.

12 Q Were you trying to hide the fact that you were  
13 taking these twenty switch ties to give to Mr. Hicke?

14 A No, I was not.

15 Q Were there others that assisted in the delivery of  
16 the ties from the track to the trailer?

17 A Yes, there was. Well, Greg was running the end  
18 loader.

19 Q And that's Greg Zielke?

20 A That's Greg Zielke, yes.

21 Q Were there any other employees that assisted?

22 A Brad helped move some on the trailer just to jostle  
23 them around a little bit.

24 Q Is that Brad Underhill?

25 A Brad Underhill. I'm sorry, yes.

MICHAEL KOZIARA - DIRECT

1 Q So do you know what happened to the remaining 60  
2 ties?

3 A They were all put down at East Winona in a big  
4 scrap pile. As far as I know, they were all hauled off.  
5 But I wasn't there when it happened.

6 Q Okay. But the 60 were taken down to East Winona?

7 A That's correct.

8 Q There were -- how many trailers were used to take  
9 the ties off the or away from the railroad tracks?

10 A Two five-by-ten trailers.

11 Q Did you own one of the trailers?

12 A Yes, I did.

13 Q And who owned the other trailer?

14 A Mr. Hicke.

15 Q And so what did Mr. Zielke do with the switch ties  
16 with the front-end loader?

17 A He loaded them on the trailers.

18 Q So he used the machine to load them on the  
19 trailers?

20 A That's correct.

21 Q And then the trailers were driven away.

22 A There was no place to put them down there for extra  
23 time. It was just a way of convenience of getting more  
24 time by not having to travel. There was no place to put  
25 the ties in the wildlife refuge, so we put them on the

MICHAEL KOZIARA - DIRECT

1 trailers and got rid of them.

2 Q I'm going to switch gears here a little bit, Mike,  
3 and turn to September 9th of 2010. Do you remember that  
4 day?

5 A Yes, I do.

6 Q Why does that day stick out?

7 A Because that's the day I broke my leg.

8 Q Let's start from the beginning of the day. You  
9 were assigned as a foreman of a work crew?

10 A Yes, I was.

11 Q Okay. And what was your crew supposed to do that  
12 day?

13 A We were supposed to go down and assist; support the  
14 tie gang that day; assist them with taking the planks  
15 out of the crossing, and taking some lags out of the  
16 switch.

17 Q And lags are those larger wooden screws?

18 A These are different lags than the ones Mr. Douglas  
19 described in the plank. These are -- just like screws,  
20 they're smaller screws that go in the plates.

21 Q Okay. Let's start from the beginning of the day.  
22 What did you do first thing when you started working  
23 that day?

24 A We were at the depot. We got our conference call.  
25 We talked to the dispatcher so I knew where I was going  
MICHAEL KOZIARA - DIRECT

1 to be. I got down there. I got on the tie gangs  
2 authority because they had already had the track. They  
3 were already working down there. They already had -- I  
4 had to get underneath their permission.

5 Q All right. So I'm going to stop you there. You  
6 said you all met at the depot. What depot that morning?

7 A Just my group met at the depot. I didn't meet with  
8 the tie gang, I met with the tie gang down at the East  
9 Winona -- the plank at the crossings.

10 Q Okay. But what depot did your crew meet in the  
11 morning?

12 A I'm sorry. The Winona section or the Winona  
13 Junction depot is where we meet every day.

14 Q All right. And you had a conference call that  
15 morning?

16 A Yes, sir.

17 Q With whom?

18 A With Mike Veitz and the dispatcher.

19 Q Did Mr. Veitz tell you you would be working with a  
20 certain roadmaster that day?

21 A Yes, he did.

22 Q And who did he tell you you would be working with?

23 A Don Jones.

24 Q And who is Don Jones?

25 A He's the assistant roadmaster for the tie gang.

MICHAEL KOZIARA - DIRECT

1 Q And what is your responsibility -- what was your  
2 responsibility that morning as foreman of the crew at  
3 the depot before your crew dispatched out to East  
4 Winona?

5 A I had to make sure that we had the truck loaded and  
6 anything we needed for the job. After we had our little  
7 briefing in the morning, we went out to the job site.

8 Q So did you do that?

9 A We did.

10 Q All right. Then you went out to the job site?

11 A Yes.

12 Q When you got there how were things going?

13 A Going good. We had briefed with Al on our  
14 authorities and, you know, the work crew was there, so  
15 we had our plan of action. And we were taking the  
16 planks out, and then Elvin came over and told me that  
17 one of the planks were stuck inside the or one of the  
18 lags were stuck inside the plank.

19 Q I'm going to stop you right there.

20 MR. MORGAN: Could you call up P11, please,  
21 Emilee.

22 Q Mr. Koziara, I'm showing you what's been marked as  
23 P11. Do you recognize P11?

24 A Yes, I do.

25 Q What is P11?

MICHAEL KOZIARA - DIRECT

1 A That's --

2 Q It's Bates stamped 904. Excuse me.

3 A That's the East Winona plank crossing that we were  
4 working at.

5 MR. MORGAN: Go to BNSF 905, please.

6 Q And do you recognize 905?

7 A Yes, I do.

8 Q And what is 905?

9 A 905 is the same crossing.

10 MR. MORGAN: I'd offer the exhibit, Your Honor.  
11 P11.

12 THE COURT: P11 includes both those  
13 photographs?

14 MR. MORGAN: Yes, Your Honor, in addition to  
15 several others, but I don't think it's --

16 THE COURT: Is there any objection to P11?

17 MR. DOUGLAS: No objection.

18 THE COURT: No objection? All right. It's  
19 admitted.

20 MR. MORGAN: Emilee, go back to P11, please.

21 BY MR. MORGAN:

22 Q So this is the crossing at East Winona, Wisconsin?

23 A That's correct.

24 Q You were mentioning that at some point in time,

25 Elvin -- is that Elvin Smothers?

MICHAEL KOZIARA - DIRECT



1 A That's correct.

2 Q -- had a conversation with you about an issue?

3 A Yes.

4 Q What do you recall him telling you?

5 A He just said that it was -- that the lag was buried  
6 into the plank and they couldn't get it out. And then  
7 the gun was broke, so they were going to go over and  
8 work on the gun.

9 Q All right. So there was a lag that was stuck that  
10 they couldn't get out.

11 A That's correct.

12 Q Where was the lag stuck, in where?

13 A Inside the plank.

14 Q Okay. And what is the typical or normal way that  
15 you remove a lag from a crossing plank?

16 A With a hydraulic gun with a socket, and it usually  
17 will -- you can get it out that way. That's how you  
18 normally do it.

19 Q And what did Mr. Smothers say? That wasn't  
20 working?

21 MR. DOUGLAS: Objection, Your Honor. Hearsay.

22 MR. MORGAN: It doesn't go to the truth.

23 THE COURT: I'll overrule it. Go ahead.

24 BY MR. MORGAN:

25 Q Go ahead, Mr. Koziara.

MICHAEL KOZIARA - DIRECT

1 A He just said it was bent over inside the lag and he  
2 couldn't get at it.

3 Q You also said that the hydraulic gun was broken?

4 A Yes, that's correct.

5 Q What was the problem with it?

6 A It just wouldn't work. I don't know what was wrong  
7 with it. They were taking it apart.

8 MR. MORGAN: Could you go to 906, please,  
9 Emilee.

10 Q Mr. Koziara, we've called up another picture from  
11 Exhibit P11. Do you recognize 906?

12 A Yes, I do.

13 Q Is that the crossing?

14 A Yes, it is.

15 Q All right. And those big pieces of wood that we  
16 see there, what are those?

17 A You mean on -- those are planks on that crossing.

18 Q All right. And then the smaller pieces that look  
19 like they're connecting the two rails, what are those?

20 A Oh, that's the ties.

21 Q Those are normal track ties.

22 A That's correct.

23 Q All right. So the bigger pieces of wood are the  
24 crossing planks.

25 A That's correct.

MICHAEL KOZIARA - DIRECT

1 Q And roughly how heavy are those planks?

2 A They're roughly 1200 pounds.

3 Q At some point did you discuss the issue that  
4 Mr. Smothers raised with you with anyone else from your  
5 work crew?

6 A Yes. I told Greg Zielke about it. He said he  
7 could get the ties out and he said he could take the  
8 whole crossing out really quickly, and I thought --

9 Q How did he propose to do that?

10 A With the end loader.

11 Q The front-end loader?

12 A That is correct.

13 Q Now who is Mr. Greg Zielke?

14 A Mr. Greg Zielke is the front-end loader operator  
15 out of La Crosse, Wisconsin.

16 Q You had worked with Mr. Zielke in the past?

17 A I have.

18 Q For how many years have you worked with Mr. Zielke?

19 A On and off in various different positions for the  
20 last -- he started in 1989 on a steel gang and then  
21 became a welder. I had worked with him in other  
22 positions besides just being the end loader operator.

23 Q So over twenty years.

24 A Over twenty years, yes.

25 Q So Mr. Zielke tells you that he can get the plank  
MICHAEL KOZIARA - DIRECT

1 out with a front-end loader?

2 A That's correct.

3 Q Okay.

4 MR. MORGAN: Could you call up P12, please.

5 I'd offer P12.

6 THE COURT: Any objection?

7 MR. DOUGLAS: Yes, Your Honor. It's not the  
8 front-end loader I believe that was used that day.

9 THE COURT: All right. You'll have to  
10 establish a little foundation for this exhibit, if you  
11 would.

12 MR. MORGAN: Okay. Fair enough. I didn't  
13 think that this exhibit was objectionable.

14 THE COURT: Understand. But it was, so let's  
15 lay the foundation.

16 BY MR. MORGAN:

17 Q Do you recognize the machinery on P12?

18 A Yeah, it's a front-end loader. I mean it's --

19 Q Does it accurately depict the front-end loader that  
20 was used on September 9, 2010?

21 A Yes, it says Caterpillar on it.

22 MR. MORGAN: I'd offer P12.

23 THE COURT: This isn't the front-end loader  
24 that was involved in the September 2010 incident, is  
25 that what you're saying?

MICHAEL KOZIARA - DIRECT

1 THE WITNESS: This is the one, yes.

2 THE COURT: That is the one that was involved.

3 THE WITNESS: Sure. You can't tell unless you  
4 see the numbers from the back side or whatever, but yes,  
5 it should be the one.

6 THE COURT: Okay.

7 THE WITNESS: It just doesn't have the forks on  
8 it.

9 THE COURT: Understood. Okay.

10 MR. DOUGLAS: No objection. Let it in.

11 THE COURT: All right. P12 is in.

12 MR. MORGAN: Thank you, Your Honor.

13 BY MR. MORGAN:

14 Q Okay. So what we see here, the machine has another  
15 device on the front of it; correct?

16 A That's correct. That's a bucket.

17 Q And what is that? Excuse me?

18 A That's just a work bucket.

19 Q Okay. Can that work bucket be removed from the  
20 front-end loader?

21 A Yes, it can.

22 Q Can other devices be attached to the front-end  
23 loader?

24 A Yes, sir.

25 Q And what was attached to the front-end loader on  
MICHAEL KOZIARA - DIRECT

1 September 9, 2010?

2 A A set of forks.

3 Q So after Mr. Zielke made that suggestion to you,  
4 what did you do?

5 A I told my work crew to back up so he could -- so  
6 Greg could remove the planks.

7 Q And when you say you told your work crew, who did  
8 that all involve?

9 A That was Elvin Smothers and Matt Kjos that were  
10 working down there.

11 Q Did you think that the proposal Mr. Zielke made was  
12 reasonable in light of the circumstance that presented  
13 itself with regard to the lag and the crossing plank  
14 that day?

15 A No, not at the time it didn't. I seemed like the  
16 reasonable thing to do.

17 Q You believed it was reasonable?

18 A As long as we discussed it, that's supposed to be  
19 the BN way of doing things.

20 Q What do you mean by that?

21 A As long as we discussed it in the job briefing and  
22 we decided a course of action that was safe and we went  
23 with it.

24 MR. MORGAN: Could you call back up P11,  
25 please. 906, please. Okay.

MICHAEL KOZIARA - DIRECT

1 Q So this is a picture again, Mr. Koziara, of P11 at  
2 906, the crossing plank; correct?

3 A That's correct.

4 Q Okay. So could you describe, using this picture  
5 for the jury, where the front-end loader -- well, first  
6 what plank was stuck? Excuse me, what lag was stuck in  
7 what plank?

8 A The lag was stuck on this -- on the --

9 THE COURT: Mr. Koziara, if you touch the  
10 screen, it will leave a little mark.

11 THE WITNESS: I didn't touch it. I thought  
12 about that.

13 THE COURT: No, it's okay. You can go ahead.  
14 I'm encouraging you to just -- you can circle the  
15 location on the picture that you want to illustrate, if  
16 you just circle it.

17 THE WITNESS: Okay. It would be the plank on  
18 the -- well, there's a river side/bluff side.

19 THE COURT: Go ahead and put your finger on it  
20 and circle it.

21 THE WITNESS: Oh, like this? (Complying)

22 THE COURT: Yep.

23 THE WITNESS: Okay. Right there. (Indicating)  
24 That was the plank. And about where the arrow is at,  
25 that's where the lag was stuck.

MICHAEL KOZIARA - DIRECT

1 BY MR. MORGAN:

2 Q Okay. And so -- that's pretty nifty.

3 THE COURT: You're John Madden. If you want  
4 that to go away, you see in the corner it says *clear all*  
5 or *clear next*. It's not a button. You just touch the  
6 screen in the corner of the screen and it will go away.

7 THE WITNESS: All right.

8 BY MR. MORGAN:

9 Q You got that?

10 A Yeah.

11 Q Okay. So can you next tell us where Mr. Zielke's  
12 front-end loader was located.

13 A Well, Greg was actually located back this way, he  
14 was back here, and he brought his machine up to here --

15 Q Okay.

16 A -- to take the plank out.

17 Q All right. So not at the end of the plank, sort of  
18 inside away from the viewer on this photograph a little  
19 bit; is that right?

20 A Right. That's where he was located when we showed  
21 up.

22 Q Okay. And how did he use the forks then?

23 A He first got in there, he went horizontal and  
24 popped the plank straight up and I was giving him  
25 directions over here.

MICHAEL KOZIARA - DIRECT



1 Q Okay. That's going to be my next question, where  
2 you were standing.

3 A Right here is where I was standing. (Indicating)

4 Q Okay. On the left-hand side of the screen you've  
5 marked an arrow.

6 A That's correct.

7 Q All right. And so the forks came up underneath the  
8 crossing plank?

9 A That's correct.

10 Q Okay. And did he lift the plank?

11 A Yes, he did.

12 Q On the first attempt?

13 A Yes.

14 Q Okay. And then what happened?

15 A Well, then he set it back down, and I could see him  
16 in the controls, he actually lifted the forks up. When  
17 he lifted the forks up, he was trying to -- I don't know  
18 if he was scooping up or what he was doing, but when he  
19 lifted them up, that's where he put pressure on that  
20 plank. In all my years, I've never seen a plank fly  
21 across and hit anybody. It always just tips over or  
22 something. It's a heavy plank. It's never shot across  
23 to the distance where I was. It should never have even  
24 touched me.

25 And I was already in the process of trying to move  
MICHAEL KOZIARA - DIRECT

1 off of that to the center of the track to go over to  
2 talk to Mr. Zielke to just tell him that he had already  
3 gotten it up and I was going to put the plank on his  
4 forks and let him move away, but it was too late. I got  
5 hit.

6 Q So where the arrows are, is that where you were  
7 standing when you got -- when the plank shot across the  
8 tracks and hit you in your left leg?

9 A That's correct, on the double arrows.

10 Q And what you were describing is you were trying to  
11 go around so that you were going to -- just tell the  
12 jury. Were you going to walk across the planks or --

13 A I was walking this way. I was walking into the  
14 center of the track to go around Mr. Zielke so I could  
15 go to his door, which was on that side, and talk to him.

16 Q And where did the crossing plank hit you,  
17 Mr. Koziara?

18 A Hit me right here. (Indicating)

19 Q Okay. So just above the ankle on the left shin?

20 A That's correct.

21 Q Did it hit anyone else?

22 A No, it did not.

23 Q Was anyone standing within two or three feet of you  
24 at the time you were hit?

25 A Al Mitchell was. He was right behind me.

MICHAEL KOZIARA - DIRECT

1 Q When you say behind you, was he physically standing  
2 right behind you?

3 A I didn't see where he was, but I could hear him  
4 when he saw me get hit. He was close.

5 Q Okay. Who's Al Mitchell?

6 A Al Mitchell is the assistant foreman on the tie  
7 gang.

8 Q Did Al Mitchell get hit?

9 A No, he did not.

10 Q What was your reaction when the crossing plank hit  
11 your left shin?

12 A Shock, and it hurt. And I just stood there for a  
13 minute and then I sat down and took my boot off to check  
14 it out.

15 Q All right. And when you checked it out, you're  
16 sitting down off to the side of the tracks at this  
17 point?

18 A Yes.

19 Q Okay. And so you took off your boot and what did  
20 you see?

21 A I saw it was bruised and a little cut up, and I  
22 kind of felt around there. I didn't think it was broke.  
23 So I thought I got lucky. I had a bandage on my right  
24 ankle. I took that off and put it on my left ankle and  
25 continued to do my job that day.

MICHAEL KOZIARA - DIRECT

1 Q While you were sitting down assessing the damage,  
2 did anyone from either your crew or the tie crew come  
3 over to you?

4 A Yes.

5 Q Who did?

6 A Al. Al did and Greg came over and apologized for  
7 hitting me.

8 Q Okay. So Al Mitchell came over?

9 A That's correct.

10 Q Do you recall Mr. Mitchell saying anything to you?

11 A No, not -- I don't remember -- I don't recall what  
12 he said. He just said it didn't look good.

13 Q And then Mr. Zielke came over?

14 A Yes.

15 Q And what did he say to you?

16 A He just said he was sorry it hit you. Are you  
17 okay? And I just said I think I am.

18 Q So what did you do after that?

19 A Bandaged up my foot and walked around on it and  
20 just kind of limped around that day and it seemed to be  
21 okay. It seemed like I could walk on it.

22 Q Was it still hurting?

23 A A little bit, yes. Oh, yeah.

24 Q Did you make it through the day?

25 A Yes, I did.

MICHAEL KOZIARA - DIRECT

1 Q At some point did you report the incident to BNSF  
2 management?

3 A I did.

4 Q And when did you first report the injury to BNSF  
5 management?

6 A When I was back at the depot, we were about ready  
7 to go home, I seen Don Jones down there and I thought I  
8 better show it to him.

9 Q And what day was that?

10 A That was on the same day, on September 9th, 2010.

11 Q So you saw Mr. Jones back at the depot?

12 A Yes.

13 Q And Mr. Jones was the assistant roadmaster that you  
14 were working with that day?

15 A Yes, it was.

16 Q And why did you report the injury incident?

17 A Well, I asked him if I could get a Band-Aid report  
18 and they said they didn't have any Band-Aid reports  
19 anymore.

20 Q What's a Band-Aid report?

21 A Well, there used to be a Band-Aid report if you got  
22 injured or cut yourself or hurt yourself real bad, you  
23 could at least document it that you were hurt, and if  
24 something came about it, then you would be okay with  
25 later reporting.

MICHAEL KOZIARA - DIRECT

1 Q Did you think it was important to report this  
2 injury?

3 A Yes.

4 Q And why is that?

5 A It was bruised. It was -- you know, it wasn't your  
6 normal little bump. I just thought it was important to  
7 show it to Mr. Jones.

8 Q Okay. And you did show him the bruise?

9 A I did.

10 Q Did you tell Mr. Jones how it happened?

11 A I did.

12 Q Did you tell him that a front-end loader was used  
13 to try to remove a crossing plank from a rail crossing?

14 A Yes, I did.

15 Q Did he tell you that that was wrong?

16 A No, he did not.

17 Q That it was a rule violation?

18 A No. He said if we had to file an injury report,  
19 we'd have to do a reenactment if he was going to take me  
20 to the hospital.

21 Q And what is a Personal Injury Report Form?

22 A A Personal Injury Report Form is where they have  
23 the -- it's a federally reported injury report that goes  
24 in to the company and gets reported to the FRA.

25 Q And you could have filled one out that day.

MICHAEL KOZIARA - DIRECT

1 A I could have.

2 Q And you chose not to.

3 A I didn't think it was that bad. I was walking on  
4 it.

5 Q What did you do after you spoke with Mr. Jones?

6 A I went home.

7 Q Did you tell your wife?

8 A I did.

9 Q Did you do anything that evening?

10 A No.

11 Q Did you go for additional treatment for the leg  
12 that evening?

13 A No, I did not.

14 Q Did you do anything to care for your leg that  
15 evening?

16 A I put some ice on it, figured the swelling would go  
17 down.

18 Q Fast forward to September 10th of 2010. That's the  
19 Friday. How was your leg feeling that morning when you  
20 woke up?

21 A It was okay, I guess. I just thought it was a  
22 little swollen yet and I thought I'll just wrap it up  
23 and go to work.

24 Q Did you put a bandage on it?

25 A I put an Ace bandage on it.

MICHAEL KOZIARA - DIRECT

1 Q Was it hurting?

2 A A little.

3 Q You were able to walk?

4 A Yeah.

5 Q Did you show anyone your injury on that Friday?

6 A I showed Elvin Smothers, Brad Underhill, and I  
7 believe the signal maintainer.

8 Q Do you recall work that day?

9 A I don't really recall what I did that day.

10 Q You were able to manage to work through the day?

11 A Yes. I don't think we did much that day, but I  
12 know we were out there probably picking up after the tie  
13 gang.

14 Q So the weekend comes, September 11th and 12th. Did  
15 you work either of those days for BNSF?

16 A No, I did not.

17 Q Did you do anything out of the ordinary that  
18 weekend?

19 A No. No, I didn't do anything out of the ordinary.

20 Q Did you generally stay around the home?

21 A Yes, I did.

22 Q How was your leg feeling over the weekend?

23 A It was fine. It was just no different than it was  
24 when I left. It just -- it wasn't -- it just wasn't  
25 swelled up as much anymore and I thought I was fine.

MICHAEL KOZIARA - DIRECT



1 Q You have a four-wheeler or an ATV at home?

2 A I do.

3 Q Does it have a plow on it?

4 A It does.

5 Q Did it look like the picture that Mr. Douglas  
6 showed us earlier during his opening remarks?

7 A No. That's a lot bigger than the one I've got.

8 Q Okay. That weekend did a plow -- did you get  
9 injured that weekend?

10 A No, I did not.

11 Q Did you hurt your left leg in any way that weekend?

12 A No, I did not.

13 Q Did you get injured at all, regardless of body  
14 part, did you get injured at all that weekend?

15 A No, I did not.

16 Q Is there a plow that is attached to the ATV or the  
17 four-wheeler?

18 A Yes.

19 Q Did you drop a plow on your foot?

20 A No, I did not drop a plow on my foot.

21 Q Did you work with a plow that day or that weekend?

22 A I messed around with it a little bit tightening  
23 bolts and stuff with it, you know. I set the plow on my  
24 steel toed boot, but it didn't hurt me.

25 Q Monday, September 13th, 2010. Were you scheduled  
MICHAEL KOZIARA - DIRECT

1 to work that day?

2 A No, I was not.

3 Q Why not?

4 A Because I was scheduled for a doctor's appointment  
5 and I had some union business down in Milwaukee.

6 Q Did you attend your doctor's appointment?

7 A Yes, I did.

8 Q Did you -- did you receive a physical examination  
9 that day?

10 A Yes, I did, for a colonoscopy.

11 Q And tell us about the physical. What happened,  
12 relative to your left leg?

13 A I told her about my injury at work. She saw the  
14 bruise, she felt my leg, and she told me to go down and  
15 do x-rays.

16 Q Did you tell her that your leg was still hurting?

17 A Yes. Well, she could see that.

18 Q Did you have an x-ray done?

19 A Yes, I did.

20 MR. MORGAN: Would you call up P9, please. I'd  
21 offer P9.

22 THE COURT: Mr. Koziara, while they're  
23 reviewing that document, if you would touch the screen  
24 to clear the screen. It's already taken care of. Thank  
25 you.

MICHAEL KOZIARA - DIRECT

1 THE WITNESS: I got it. I was looking for it.

2 MR. DOUGLAS: No objections.

3 THE COURT: All right. P9 is admitted.

4 BY MR. MORGAN:

5 Q All right. Do you recognize P9 as one of your  
6 medical records, Mr. Koziara?

7 A Yes, I do.

8 Q Okay.

9 MR. MORGAN: Can you turn to the second page,  
10 please, Emilee.

11 Q And is this the second page of the medical record?

12 A Yes, it is.

13 Q Okay.

14 MR. MORGAN: Emilee, can you blow up the  
15 *Addendum* section. The bottom part under *Addendum*,  
16 please.

17 Q And the note reads that you returned from x-ray and  
18 there's a distal tibial fracture. Is that what you  
19 understood was broken in your left leg on September  
20 13th, 2010, Mr. Koziara?

21 A That's correct.

22 Q Okay. Were you provided a walking boot?

23 A Yes, I was.

24 Q It also says, "Michael informed me that he will not  
25 be claiming this as a worker's compensation injury." Do  
MICHAEL KOZIARA - DIRECT

1 you see that?

2 A Yes, I do.

3 Q Did you tell the doctor that?

4 A I told her we don't have workman's comp.

5 Q What do you mean by that?

6 A We have FEOLA, which is called the Federal Employee  
7 Liability Act. We don't have workman's comp.

8 Q And is that why you told the doctor that?

9 A That's what I told her.

10 Q Were you provided a walking boot that day?

11 A Yes, I was.

12 Q This says, "I had the pleasure to see Michael, age  
13 50, for the above. He had labs prior to his visit that  
14 we reviewed. Michael sustained an injury at work but  
15 has not reported it there."

16 Do you see that notation?

17 A That's correct, yes.

18 Q Okay. Did you talk to the doctor about reporting  
19 your injury?

20 A Yes, I did.

21 Q And what did you tell the doctor?

22 A I hadn't filled out the injury report yet.

23 Q And then it says, "He was hit in the left shin and  
24 ankle. It is quite bruised and tender though has  
25 gradually gotten better. The injury occurred on  
MICHAEL KOZIARA - DIRECT

1 September 9"; correct?

2 A That's correct.

3 Q And you told the doctor that as well?

4 A Yes, I did.

5 Q All right. On that day, did you receive any  
6 medical care for your right foot?

7 A No, I did not.

8 Q Did you receive any medical care for any other  
9 injury that you had sustained within the last several  
10 days?

11 A No, I did not.

12 Q What was going through your mind at that point when  
13 you learned that you had a broken bone in your left leg?

14 A Fear.

15 Q Why do you say that?

16 A Because I was after the 72 hours that Don Jones had  
17 told me that I had to fill out an injury report and I  
18 was past the 72 hours and I thought for sure that I was  
19 going to get fired for late injury reporting.

20 Q Had you filled out injury report forms in the past?

21 A I have.

22 Q Do you recall filling an injury report form out in  
23 1988?

24 A I do.

25 Q Do you recall the incident that gave rise to your  
MICHAEL KOZIARA - DIRECT

1 filling out an injury report form in 1988?

2 A Yes. I filled one out and I had the supervisor rip  
3 it up --

4 Q Let me stop you there. Do you remember the  
5 incident that gave rise to you having to fill one out?

6 A Yes.

7 Q Okay. Just briefly describe for the jury what had  
8 happened that day.

9 MR. DOUGLAS: Objection, Your Honor.  
10 Relevance.

11 THE COURT: I'll overrule that. Go ahead.  
12 Very briefly though.

13 THE WITNESS: Okay. It was -- it was an injury  
14 where I had fell into a hole or a ditch made by the  
15 bridge and builders guys. I got tangled up in the barb  
16 wire and I went into the hole. I turned in an injury  
17 report to the foreman; he turned it in to the  
18 roadmaster. He came out, screamed at me "What the eff  
19 is this?" And then tore off my face and says, "You're  
20 going to get 30 days off."

21 I found out later after he had tore it up that he  
22 was in more trouble than I was. So that's what happened  
23 there.

24 BY MR. MORGAN:

25 Q Did you think about that experience at the doctor's  
MICHAEL KOZIARA - DIRECT

1 office that day?

2 A Yes. It was -- and there was another one too that  
3 I thought about.

4 Q What was that?

5 A I had another -- I had a late injury report that I  
6 had turned in. And the roadmaster at that time was Tom  
7 Dean, who told me I was going to get five days off no  
8 matter what. And the reason that happened is because I  
9 reported the injury, but there was no forms in the depot  
10 to fill out. So when I went home, they said I filed it  
11 late after I had been -- I had been to the hospital  
12 early that day.

13 Q And that happened in what year?

14 A That happened in 1993 or -4, somewhere in there.

15 Q And did you get disciplined that time for filling  
16 out a late form?

17 A Yes, I did.

18 Q And how much discipline did you receive?

19 A I received five days off.

20 Q So did you have your left leg then in a walking  
21 boot when you left the doctor's office that day?

22 A Yes, I did.

23 Q Were you on crutches or a wheelchair or anything  
24 like that?

25 A No.

MICHAEL KOZIARA - DIRECT

1 Q You were able to walk out on your own volition?

2 A That's correct.

3 Q Did you also have previously scheduled union  
4 business on that Monday?

5 A I did.

6 Q Did you go to Milwaukee?

7 A I did.

8 Q That day did you also place a series of phone calls  
9 after you learned about the bone in your left leg?

10 A Yes, I did.

11 Q Did you call -- who did you first call?

12 A I believe I first called Tom Arentz.

13 Q And who is Tom -- Tom Arentz; right?

14 A Tom Arentz. He's a fellow worker at work. He's  
15 the clerk. I just told him I wasn't going to be in, I  
16 was going to get a doctor's notice for being time off.

17 Q Did you tell him anything else about how you got  
18 injured?

19 A I think I told him I got injured at home. I also  
20 told that to Brad Underhill.

21 Q Okay. We'll stay with Mr. Arentz. Did you tell  
22 Mr. Arentz anything else?

23 A Not that I remember.

24 Q And then did you make a second phone call?

25 A Yes, I did.

MICHAEL KOZIARA - DIRECT



1 Q Who did you call?

2 A Brad Underhill.

3 Q And who is Brad Underhill?

4 A Brad Underhill is my relief foreman for when I go  
5 to my political stuff. I told him he'd be the foreman  
6 in charge afterwards.

7 Q And what did you tell Mr. Underhill?

8 A I told Brad he was just going to have to show up to  
9 work. Brad likes to miss work. But anyway I told him I  
10 got hurt on the ATV at home. I made up a story. I was  
11 afraid.

12 Q Did you place additional calls that day after you  
13 spoke with Mr. Arentz and Mr. Underhill?

14 A Yes.

15 Q Who did you call?

16 A I called our vice general chairman of the union,  
17 Don Willings, and the lawyer Charlie or Russ  
18 Ingebritson.

19 Q He's a lawyer that does railroad litigation?

20 A He does -- yeah, he's -- he's the actual designated  
21 attorney for our Local.

22 Q Okay. And do you recall or remember the call with  
23 Mr. Willing?

24 A Yes, I do.

25 Q Okay. And could you tell us what was discussed?

MICHAEL KOZIARA - DIRECT

1 A He told me that you need to turn in that injury  
2 report, and he also told me I should call Russ  
3 Ingebritson because he knows the law better. And when I  
4 called -- can I go to --

5 Q Sure. Go ahead.

6 A When I called Russ, he told me that it was a  
7 federal law and that I had to turn that injury report in  
8 for that injury.

9 Q So what did you do after you spoke with Mr. Willing  
10 and Mr. Ingebritson?

11 A I called Mr. Arentz and Mr. Underhill back.

12 Q Did you call them back the same day?

13 A I did.

14 Q And what did you tell Mr. Arentz?

15 A I just apologized for not telling him the truth,  
16 because your word is everything, and I just felt bad  
17 about it and I just wanted to let him know that it was  
18 done at work.

19 Q And how about Mr. Underhill? What did you say to  
20 him?

21 A He called me actually and I told him the same  
22 thing, that I was sorry and I was just kidding and it  
23 was actually done at work.

24 Q Is this the same Mr. Underhill who saw the injury,  
25 at least the bruise on your left leg on Friday,

MICHAEL KOZIARA - DIRECT

1 September 10th?

2 A That's correct.

3 Q After those series of calls, who did you call next?

4 A After I was done with my union business, I called  
5 Mr. Veitz either that night or the next morning.

6 Q So either the night of the 13th or the morning of  
7 the 14th?

8 A I remember calling him from the motel room and told  
9 him I was going to come and report the injury.

10 Q Did you tell Mr. Veitz about the injury?

11 A Yes.

12 Q Did you tell him how it occurred?

13 A Yes.

14 Q Did you tell him that a front-end loader was used  
15 to try and lift the plank?

16 MR. DOUGLAS: Objection, Your Honor. Leading.

17 THE COURT: Sustained.

18 BY MR. MORGAN:

19 Q Just tell us what you told Mr. Veitz about the  
20 injury that day.

21 A I told him I got hurt at work with -- a plank hit  
22 my leg from the end loader and that I told Don Willing  
23 or Don Jones, the roadmaster, that I had gotten hurt  
24 that day and I was going to report the injury.

25 Q Did you ever tell Mr. Veitz that you got injured at  
MICHAEL KOZIARA - DIRECT

1 home?

2 A No, I did not.

3 Q Why not?

4 A Because I didn't get hurt at home.

5 Q What was Mr. Veitz's response?

6 A He just said he was at a derailment and he couldn't  
7 be there and he was going to be -- and he couldn't be  
8 there for the injury report. And I just told him that I  
9 could give it to somebody else that's management at  
10 BNSF.

11 Q Did you do that? Did you fill out an injury  
12 report?

13 A I did. I came back to La Crosse from Milwaukee and  
14 filled out the report immediately.

15 Q And when was that? What day was that?

16 A That was the 14th. September the 14th, 2010.

17 Q Were you able to work that Tuesday?

18 A Yes, I was able to work -- no, I wasn't able to  
19 work that Tuesday because I already had a walking boot  
20 on. But I was trying to remember what the attorney said  
21 too. He said that -- he said about the 72-hour rule, he  
22 said it was -- he said it was point of discovery is what  
23 was -- why they couldn't get me for the late injury  
24 reporting, because it was a point of discovery is when  
25 you can turn your injury report in. So I didn't know I

MICHAEL KOZIARA - DIRECT

1 was injured until that day. That's why I reported that  
2 injury.

3 Q So on the 14th, where did you fill out the Personal  
4 Injury Report Form?

5 A I filled it out in La Crosse, Wisconsin.

6 Q Okay. And where in La Crosse, Wisconsin?

7 A At the La Crosse, Wisconsin depot.

8 Q Did you have somebody accompany you to the  
9 La Crosse depot?

10 A Yes, I had a friend.

11 Q And who accompanied you?

12 A He was named Jim Schaitel.

13 Q And who is Mr. Jim Schaitel?

14 A Mr. Schaitel used to work out there. He's a  
15 retired old welder and he was our old Local chairman.  
16 He was the only one I knew was off. I just kind of  
17 wanted somebody with me.

18 MR. MORGAN: Would you call up P2, please.

19 Q Do you recognize Exhibit P2, Mr. Koziara?

20 A Yes, I do.

21 Q There's another page. Turn to the second page. Is  
22 that part of Exhibit 2 as well, the second page,  
23 Mr. Koziara?

24 A Yes. Yes, sir, it is.

25 Q Is this a true and correct copy of a document you  
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1 filled out and submitted on September 14th, 2010?

2 A That is correct.

3 MR. MORGAN: I'd offer P2.

4 THE COURT: Any objection?

5 MR. DOUGLAS: None.

6 THE COURT: P2 is admitted.

7 MR. MORGAN: Okay. Let's go back to the first  
8 page, Emilee.

9 BY MR. MORGAN:

10 Q So this is the BNSF Railway Personal  
11 Injury/Occupational Illness Report Form; correct?

12 A That's correct.

13 Q Is that your handwriting?

14 A Yes, it is.

15 Q And you filled this out; correct?

16 A Yes, it is.

17 Q Mr. Schaitel didn't fill it out?

18 A No, he didn't.

19 Q And you provided this to a Mr. Kramer?

20 A Yes, I did.

21 Q And did Mr. -- what was Mr. Kramer's position at  
22 the time you handed him this form?

23 A Mr. Kramer was a trainmaster. He was in charge of  
24 the train crews.

25 Q Management?

MICHAEL KOZIARA - DIRECT

1 A Management, that's correct.

2 Q Did Mr. Kramer say anything to you as you submitted  
3 it to him?

4 A When I went to his office to submit it to him, he  
5 said "This isn't good."

6 Q Did you ask him what he meant by that?

7 A No. I pretty much knew what he meant by that.

8 Q What did you believe he meant by that?

9 A Well, this was just going to be more trouble down  
10 the road.

11 Q At the bottom of P2 it asks you --

12 MR. MORGAN: Could you call up the lower third  
13 of the exhibit, please, Emilee.

14 Q So what we're looking at here, it says, "Important.  
15 List all persons who witnessed the injury or who can  
16 give any information about it."

17 Do you see that?

18 A Yes, I do.

19 Q Is this your handwriting, the names you listed  
20 here?

21 A Yes, it is.

22 Q Okay. So you list Al Mitchell; correct?

23 A That's correct.

24 Q And why did you list Al Mitchell first?

25 A Because he was standing behind me.

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1 Q And then you also have Don Jones, amongst others,  
2 listed there; correct?

3 A That's correct.

4 Q Okay. And you identify him as roadmaster; right?

5 A Correct.

6 Q And then it says Holmen was notified day of  
7 incident. Did you write that?

8 A Right. That's where he lives, in Holmen, and I  
9 just wrote it down there to make sure they had it.

10 Q Is that your signature?

11 A Yes, it is.

12 Q And the date of September 14th; correct?

13 A That's correct.

14 Q Did you have any other discussion with Mr. Kramer  
15 on September 14th other than the one comment he made to  
16 you?

17 A No, I did not.

18 Q Did you do anything else at the depot that day?

19 A No. I left.

20 Q With regard to the injury and the incident on  
21 September 9th, 2010, what happened next?

22 A Two days later I got a notice of an investigation.

23 Q All right.

24 MR. MORGAN: Call up P33, please.

25 THE COURT: Mr. Morgan, I'd like to take a  
MICHAEL KOZIARA - DIRECT



1 break some time between now and 3:30, so I'll let you  
2 decide when you're at an appropriate spot for that.

3 MR. MORGAN: This is as good a time as any.

4 THE COURT: Why don't we take our afternoon  
5 break. We'll take a break. We will come back at 3:30.  
6 And remember not to talk about the case. Don't do any  
7 research on the case. You can leave your notebooks  
8 here, just put them on your seat. They'll be there when  
9 you get back. And we'll see you in just over fifteen  
10 minutes.

11 MR. MORGAN: Thank you, Your Honor.

12 (Jury excused from courtroom at 3:14 p.m.)

13 THE COURT: We'll see you back here at 3:30.

14 (Recess 3:14-3:34 p.m.)

15 THE COURT: Are we ready to bring the jury  
16 back?

17 MR. MORGAN: In 30 seconds, please.

18 MR. KASTER: Forgot his binder in the other  
19 room.

20 MR. MORGAN: Your Honor, before the jury  
21 arrives, Mr. Mitchell is here. He's who we intended to  
22 call second. He lives in Lake Pepin, which is about a  
23 three-hour or so drive. Mr. Douglas and I spoke. I'd  
24 like to get him out today so he doesn't have to stay  
25 overnight, so...

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1 THE COURT: So is your suggestion that you  
2 defer the cross of Mr. Koziara? Is that where we're  
3 going with this?

4 MR. DOUGLAS: Yeah. That's okay.

5 MR. MORGAN: Yeah, as long as the Court doesn't  
6 have a --

7 THE COURT: I have no objection to that. I  
8 think it's a courtesy to the witness. I'll be happy to  
9 do that as long as -- I wouldn't do it without defense  
10 consent to it.

11 MR. DOUGLAS: Sure.

12 THE COURT: But with it, I have no trouble from  
13 my perspective.

14 MR. MORGAN: Thank you, Your Honor.

15 MR. DOUGLAS: And again, depending on the time  
16 period, I could begin my cross today after Mitchell is  
17 done if the Court would like so we can fill out the day.

18 THE COURT: Oh, yeah. Let's use the whole  
19 clock.

20 MR. DOUGLAS: Okay.

21 THE COURT: Okay? Let's bring the jury back.  
22 Thank you.

23 (Jury brought in courtroom at 3:35 p.m.)

24 THE CLERK: This Honorable Court is again in  
25 session. Please be seated and come to order.

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1 THE COURT: All right. Mr. Morgan, you may  
2 continue.

3 MR. MORGAN: Thank you, Your Honor.

4 BY MR. MORGAN:

5 Q Mr. Koziara, when we left off, we were talking  
6 about what happened next relative to the injury  
7 investigation; correct?

8 A Correct.

9 Q All right.

10 MR. MORGAN: Could you call up P33, please.

11 Q Do you recognize P33, Mr. Koziara?

12 A Yes, I do.

13 Q And what is it?

14 A That is the investigation notice for my alert and  
15 attentiveness.

16 MR. MORGAN: I'd offer P33.

17 THE COURT: Any objection?

18 MR. DOUGLAS: No objection, Your Honor.

19 THE COURT: Thank you. P33 is admitted.

20 MR. MORGAN: Thank you.

21 BY MR. MORGAN:

22 Q Did you receive this notice on September 16th,  
23 2010?

24 A Yes, I did.

25 Q And how did you receive the notice?  
MICHAEL KOZIARA - DIRECT

1 A I was called into the office in La Crosse,  
2 Wisconsin at the depot, in Mike Veitz's office.

3 MR. MORGAN: Emilee, perhaps you could blow up  
4 the body of the letter starting at *Arrange to* to the  
5 bottom just so it's easier to read. Thank you.

6 Q Who called you to the depot?

7 A Mike Veitz.

8 Q And what happened when you arrived?

9 A He says I have an investigation notice for you.

10 Q And did he hand you this copy?

11 A Yes, he did.

12 Q Did he say anything else?

13 A No. Just sign it. You have to sign this.

14 Q Did you sign it?

15 A I did.

16 Q How did you feel when Mr. Veitz handed you this  
17 Exhibit P33?

18 A I was a little upset.

19 Q Why is that?

20 A I didn't feel I was unalert or inattentive like it  
21 says on there, and I figured this was just another way  
22 for them going after me for breaking my leg.

23 Q Did you communicate any of that to Mr. Veitz?

24 A No.

25 MR. MORGAN: Could you call up P5, please,  
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1 Emilee, and turn to page 537. This is in evidence, Your  
2 Honor.

3 THE COURT: 5 is already in? All right.

4 MR. MORGAN: Would you blow up 1.1.2, please.

5 BY MR. MORGAN:

6 Q Do you recognize Rule 1.1.2, Mr. Koziara?

7 A Yes, I do.

8 Q Was this one of the rules that you were under  
9 investigation for?

10 A Yes, I was.

11 Q At least as you understood it?

12 A That's correct.

13 Q Are you familiar with rule -- Operating Rule 1.6,  
14 Mr. Koziara?

15 A Yes, I am.

16 Q Okay. "Conduct. Number 1: Careless of the safety  
17 of themselves or others."

18 Are you familiar with that rule?

19 A That's correct.

20 Q Did you understand this was the other rule that you  
21 were under investigation for?

22 A Yes, sir.

23 Q Mr. Koziara, to your knowledge did anyone else  
24 receive a notice of investigation for the incident  
25 involving your leg on Thursday, September 9, 2010?

MICHAEL KOZIARA - DIRECT

1 A Nobody else did.

2 Q To your knowledge was anyone else injured that day?

3 A No one else but me.

4 Q How about Al Mitchell? To your knowledge did he  
5 get charged with any rule violations?

6 A No, he did not.

7 Q How about Greg Zielke, the individual driving the  
8 front-end loader that day? Did he get charged with any  
9 rule violations?

10 A Not a one.

11 MR. MORGAN: Now the notice of investigation,  
12 if you could pull that back up, please, Emilee. P33.  
13 And the first paragraph, please.

14 Q The notice of investigation references to attend a  
15 hearing. Is that a hearing?

16 A That's correct.

17 Q On Thursday, September 23, 2010, in La Crosse. Did  
18 you attend that hearing?

19 A Yes, I did.

20 Q On September 23, 2010?

21 A Yes, I did.

22 Q Did someone preside over the hearing?

23 A Management did. Michael Heille.

24 Q Did you have any input in assigning Mr. Heille as  
25 the hearing officer that day?

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1 A No, I did not.

2 Q You did have someone accompany you to the hearing?

3 A Yes, I did.

4 Q Who was there on your behalf?

5 A It was a Local chairman Chris Davis, and Don  
6 Willing was there to kind of supervise them.

7 Q Is Mr. Davis to your knowledge an attorney?

8 A No, he's not.

9 Q Can you bring an attorney to the hearing?

10 A No, you can't.

11 Q Could you -- do you know whether you had the right  
12 to subpoena or compel witnesses to attend?

13 A No, you don't.

14 Q Is there someone that represents BNSF at the  
15 hearing?

16 A Yes, sir.

17 Q Who?

18 A Michael Heille.

19 Q The same person that is the hearing officer.

20 A That's correct.

21 Q Did he ask you questions?

22 A Yes, he did.

23 Q What was the result of that hearing on September  
24 23rd?

25 A I was given a 30-day record suspension for that and  
MICHAEL KOZIARA - DIRECT

1 a year probation.

2 Q A year of probation as well?

3 A Yes.

4 MR. MORGAN: Call up P7, please. Could you  
5 blow up the first three paragraphs, please.

6 I'm sorry. We offer P7.

7 THE COURT: Any objection? No objection?

8 MR. DOUGLAS: No objection.

9 THE COURT: Okay. Admitted.

10 MR. MORGAN: Thank you, Your Honor. Sorry  
11 about that.

12 THE COURT: That's all right.

13 BY MR. MORGAN:

14 Q Is this the Level S 30-day suspension that you  
15 received?

16 A Yes, it is.

17 Q And you received it on October 18th, 2010?

18 A That's correct.

19 Q What is a 30-day record suspension? Level S 30-day  
20 record suspension.

21 A Well, Level S is a serious violation, which if you  
22 have so many in a special time period, you'll be  
23 terminated. The 30-day record suspension is just  
24 another black mark on your record. And they have  
25 progressive disciplinary, so the more time you have, the

MICHAEL KOZIARA - DIRECT



1 more you'll get. And then with the one-year probation,  
2 if anything happens, they can just terminate you.

3 Q And then it says, "It has been determined through  
4 testimony and exhibits brought forth during the  
5 investigation that you were in violation of MOWOR 1.1.2  
6 Alert and Attentive and MOWOR 1.6 Conduct."

7 Do you see that?

8 A I do.

9 Q And those are the rules that we just looked at a  
10 couple minutes ago?

11 A That's correct.

12 MR. MORGAN: Could you call up 1.1.2, Emilee,  
13 please. It's that P5, 537.

14 Q Did you tell Mr. Heille at the investigation that  
15 you gave a briefing to the work crew before the  
16 front-end loader was used?

17 A Yes, I did.

18 Q Did you tell Mr. Heille that you told your crew to  
19 move away?

20 A Yes, I did.

21 Q Did you tell Mr. Heille that it was Mr. Zielke's  
22 idea to use the front-end loader?

23 A Yes, I did.

24 Q Did you also, during this injury investigation,  
25 receive a second notice of investigation?

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1 A Yes, I did.

2 MR. MORGAN: Can you call up P31, please.

3 Q Do you recognize Exhibit P31?

4 A Yes, sir.

5 Q And what is P31?

6 A It's another investigation notice for theft and  
7 dishonesty.

8 Q Did you receive a copy of this letter?

9 A Yes.

10 MR. MORGAN: I'd offer P31.

11 THE COURT: Any objection?

12 MR. DOUGLAS: No objection.

13 THE COURT: P31 is admitted.

14 MR. MORGAN: Thank you, Your Honor. Could you  
15 blow up, please, the first full paragraph, Emilee.

16 BY MR. MORGAN:

17 Q This references a requirement for you to attend  
18 another investigation hearing on Monday, October 18th,  
19 2010; correct?

20 A Correct.

21 Q Okay. And is this the notice you received in  
22 connection with the twenty switch ties that you gave  
23 away?

24 A That's correct.

25 Q That we discussed earlier, that incident?  
MICHAEL KOZIARA - DIRECT

1 A Yes, sir.

2 Q Did you -- where did you receive this notice?

3 A I had to go and sign for this, again, down at the  
4 La Crosse depot at Mike Veitz's office.

5 Q So did you receive a call from Mr. Veitz?

6 A Yes, I did.

7 Q And what did he tell you?

8 A He says "I have something for you to sign," and he  
9 gave me that paper.

10 Q And what was your reaction when you received a copy  
11 of this at the depot?

12 A I was very upset.

13 Q And why is that?

14 A Because I just kind of said, "What do you think you  
15 guys are doing?" You know, I was upset. I just signed  
16 the paper and out the door I went. I was pissed.

17 Q Why were you so upset?

18 A Because it was just another way of them lining me  
19 up to fire me. They already gave me an investigation  
20 notice before for alert and attentive, then a year  
21 probation, and then now I have this.

22 Q Did you attend a second hearing on October 18,  
23 2010?

24 A Yes, I did.

25 MR. MORGAN: Could you call up P5, please.  
MICHAEL KOZIARA - DIRECT

1 Page 542. Could you blow up 1.6.

2 Q You're familiar with 1.6, Mr. Koziara?

3 A Yes, I am.

4 Q And the dishonesty section of 1.6?

5 A Correct.

6 Q Is this the rule you understood BNSF was charging  
7 you with potentially violating?

8 A Yes.

9 MR. MORGAN: Could you go to page 544, please.  
10 Blow up 1.19.

11 Q Says this is *Care of Property*. 1.19. Are you  
12 familiar with this rule?

13 A Yes.

14 Q The last sentence says, "Employees must not use  
15 railroad property for their personal use."

16 Do you see that?

17 A Yes, I do.

18 Q Did BNSF charge you with violating this rule?

19 A No, they did not.

20 MR. MORGAN: Go to 538, please. Excuse me.  
21 That's okay. I don't need it.

22 Q You were just charged with violating Rule 1.6.

23 A That's correct.

24 Q So when you attended the investigation, did you  
25 have the same hearing officer?

MICHAEL KOZIARA - DIRECT

1 A Yes, I did.

2 Q Did you bring someone with you?

3 A Yes, I did.

4 Q And who did you bring with you?

5 A Jim McGill.

6 Q And was Mr. Davis with you that day?

7 A No, he was not.

8 Q And who is Mr. McGill?

9 A Mr. McGill is the Local chairman out of Chicago.

10 Q To your knowledge is he a lawyer?

11 A No, he's not.

12 Q Were you able to subpoena or compel witnesses to  
13 testify at that hearing?

14 A No, we weren't.

15 Q Could you -- did you describe -- strike that.

16 Did you tell Mr. Heille that you got consent from  
17 Mr. Veitz?

18 A Yes, I did.

19 Q Did you tell him that you had taken ties in the  
20 past?

21 A Yes, I did.

22 Q Did you ever deny taking the twenty switch ties on  
23 August 30th of 2010?

24 A No, I never did.

25 MR. MORGAN: Would you go to P8, please.  
MICHAEL KOZIARA - DIRECT

1 THE COURT: Is this one in? Okay.

2 Q Do you recognize P8, Mr. Koziara?

3 A Yes, I do.

4 Q And what is it?

5 A It's my dismissal notice.

6 Q Did you receive a copy of this?

7 A I got it in the mail.

8 MR. MORGAN: I'd offer P8.

9 THE COURT: Any objection?

10 MR. DOUGLAS: No objection, Your Honor.

11 THE COURT: P8 is admitted.

12 MR. MORGAN: Could you blow up the first half  
13 of the letter, starting with the date at the top down to  
14 the second full paragraph, please.

15 BY MR. MORGAN:

16 Q So you received this in the mail did you say?

17 A That's correct.

18 Q And it says in the letter that it was determined  
19 that you were in violation of MOWOR 1.6 Conduct;  
20 correct?

21 A That's correct.

22 Q Do you remember receiving this dismissal letter?

23 A Yes, I did -- I do.

24 Q Tell us what you remember about it.

25 A I remember getting it that day and I remember my  
MICHAEL KOZIARA - DIRECT

1 stepdaughter being there and she just cried and said  
2 that's the only job she ever knew I had. And I just --  
3 there goes my career. Everything went down -- my job,  
4 my chance of being -- going all the way through for  
5 retirement all the way to the end with full benefits,  
6 you know. And it just -- it was just crushing that day.  
7 It was all my whole dreams were just crushed because I  
8 had gotten that dismissal notice. I didn't expect to  
9 get dismissed for anything like this.

10 Q You had identified other employees of BNSF who  
11 assisted in the removal of the switch ties on that  
12 August 30th; right?

13 A Yes.

14 Q Did anyone who assisted you in the removal of the  
15 ties get charged with discipline to your knowledge?

16 A Nobody got charged. Nobody.

17 Q In your 32 years, are you aware of anyone being  
18 terminated for giving away twenty used switch ties?

19 A No, sir. Nobody has ever been dismissed for giving  
20 away scrap ties that I know of.

21 Q You mentioned that prior to August 30th you had  
22 taken ties on a couple of other occasions.

23 A That's correct.

24 Q And you received consent from Mr. Veitz?

25 A That's correct.

MICHAEL KOZIARA - DIRECT

1 Q Were you ever disciplined for those two occasions?

2 A No, I was not.

3 Q Were you injured when you got permission from  
4 Mr. Veitz on those previous two occasions?

5 A No, I was not.

6 MR. MORGAN: That's all I have for you,  
7 Mr. Koziara. Thank you very much.

8 THE COURT: Thank you, Mr. Koziara. I  
9 understand that we're going to defer Mr. Koziara's  
10 cross-examination; is that right?

11 MR. DOUGLAS: Yes, sir.

12 THE COURT: Ladies and Gentlemen of the Jury,  
13 as a courtesy between counsel, which I greatly  
14 appreciate, to accommodate the schedule of another  
15 witness, we're going to move to that witness now.  
16 Mr. Koziara will be cross-examined by one of the  
17 attorneys on behalf of BNSF, but just because we've got  
18 somebody on a tight schedule, we're going to take that  
19 witness and then we'll get back to the cross-examination  
20 of Mr. Koziara. So I appreciate the courtesy that  
21 counsel have shown to each other on this.

22 (Witness excused at 3:55 p.m.)

23 THE COURT: And you may call your next witness.

24 MR. MORGAN: Plaintiff calls Al Mitchell to the  
25 stand.

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1           **AL MITCHELL, PLAINTIFF'S WITNESS, SWORN,**

2                           DIRECT EXAMINATION

3       BY MR. MORGAN:

4       Q     Good afternoon, Mr. Mitchell.

5       A     Good afternoon.

6       Q     Nice to see you again. My name is Matt Morgan. I  
7       represent Mr. Michael Koziara in this case. Do you  
8       understand that?

9       A     Yes, I do.

10      Q     Okay. And we took your deposition last year and I  
11     asked you some questions then; correct?

12      A     That is correct.

13      Q     All right. Mr. Mitchell, where do you live?

14      A     Pepin, Wisconsin.

15      Q     And where is that?

16      A     About three hours north of here.

17      Q     Okay. So you drove here today to testify?

18      A     Yes.

19      Q     Thank you. Are you employed?

20      A     Yes, I am.

21      Q     And who is your employer?

22      A     BNSF Railroad.

23      Q     What do you do for BNSF?

24      A     Right now I'm a surface gang foreman.

25      Q     And what does that mean?

AL MITCHELL - DIRECT

1 A I have to reinstall track where I have the two guys  
2 underneath me and we use machines to level it off and  
3 straighten it out.

4 Q How long have you been the surface gang foreman?

5 A Two years now.

6 Q What did you do before that?

7 A I was foreman for a tie gang.

8 Q And how long have you worked for BNSF?

9 A It will be 19 years June 1st.

10 Q So what year does that mean you started?

11 A 1996.

12 Q Okay. So in August/September of 2010 time frame,  
13 what position would you have held for the company?

14 A I was assistant foreman for a tie gang.

15 Q What tracks do you mostly work on? Are there  
16 located in Wisconsin? Minnesota? Where do you work  
17 typically?

18 A Most -- last five/six years I've been all over the  
19 western half of the U.S.

20 Q Outside fixing track?

21 A Right.

22 Q Do you know Mike Koziara?

23 A Yes, I do.

24 Q How do you know Mr. Koziara?

25 A Worked together.

AL MITCHELL - DIRECT

1 Q And just generally describe the occasions that you  
2 would work with Mr. Koziara.

3 A Well, at one point in time there was two foremens  
4 in Winona and he happened to be one and I was the other.  
5 And then on different occasions we worked together  
6 fixing track and repairing stuff.

7 Q Fair to say that you've known Mr. Koziara, worked  
8 with Mr. Koziara, and have known him since you began  
9 working at BNSF?

10 A Pretty much, yes.

11 Q Are you familiar with the Operating Rules at BNSF?

12 A Yes, I am.

13 Q Are you familiar with the on-track rules at BNSF?

14 A Yes, I am.

15 Q Do you try to comply with those rules,  
16 Mr. Mitchell?

17 A Yes, I do.

18 Q In your 19 years as an employee of BNSF, have you  
19 ever been disciplined for violating an Operating Rule?

20 A Yes.

21 Q And when were you disciplined for violating an  
22 Operating Rule?

23 A Last Friday, because I had a flag for a Form B that  
24 fell down, and I didn't know it, but they brought it to  
25 my attention, so I failed an ops test.

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1 Q You were disciplined by your roadmaster?

2 A No, it was not my roadmaster, it was another  
3 roadmaster and a company rep.

4 Q Other than this incident last Friday, had you ever  
5 received discipline for violating an Operating Rule?

6 A No.

7 Q Do you recall working on a tie gang, as the  
8 assistant foreman for a tie gang in the August/September  
9 2010 time frame?

10 A Yes, I do.

11 Q Specifically on September 9 of 2010, at East  
12 Winona, Wisconsin at a rail crossing?

13 A Yes.

14 Q You recall that date?

15 A Pretty much. Some things are faded away, but --

16 Q It's been a number of years since then.

17 A Yes.

18 Q I understand. Was your gang working with  
19 Mr. Koziara's gang that day?

20 A Well, we had a system tie gang in and he was the  
21 section foreman for East Winona.

22 Q And what was the tie gang trying to do?

23 A We were putting in new ties, taking out old and  
24 putting in new ties.

25 Q And what was Mr. Koziara's crew doing?

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1 A They were taking out crossings and helping with  
2 some of the other stuff for switch plates and that.

3 Q At some point were there attempts to remove a  
4 crossing plank that were unsuccessful?

5 A Yes.

6 Q Do you recall the use of a front-end loader with --  
7 as an attempt to remove the crossing plank?

8 A Yes, I do.

9 Q Okay.

10 MR. MORGAN: Would you call up P11, please.

11 THE COURT: I think this is in already; right?

12 MR. MORGAN: It is, Your Honor.

13 Q So Mr. Mitchell, you'll see on your screen there's  
14 an exhibit, and I'll represent to you the picture you  
15 see has been identified as the crossing that the crew --  
16 the work crew, Mr. Koziara's work crew was working on on  
17 September 9, 2010.

18 Does that look familiar to you?

19 A Yes.

20 Q You recognize it?

21 A Yes.

22 Q Okay. And can you -- did you observe the front-end  
23 loader that day?

24 A Yes, I did.

25 Q Trying to remove the plank from the ground?

AL MITCHELL - DIRECT

1 A Yes, I did.

2 Q Okay. And could you describe for us where you  
3 recall the front-end loader on this screen?

4 A It would be on the -- I've got to get my bearings  
5 straight. It would have been on the right-hand side of  
6 the crossing.

7 Q Okay. As we're looking at the picture?

8 A Right.

9 Q Okay. And then with your -- you can touch the  
10 screen and there will be a little mark there. Could you  
11 identify where you were standing when the front-end  
12 loader was trying to lift the plank?

13 A I would have been way back in here somewhere.  
14 (Indicating)

15 Q Okay. And where do you recall Mike Koziara  
16 standing?

17 A I believe he was standing right up here.  
18 (Indicating)

19 Q Okay. What was the distance between you and  
20 Mr. Koziara when the crossing plank tried to lift or the  
21 front-end loader tried to lift the crossing plank off  
22 the ground?

23 A It was probably close to 20/25 feet.

24 Q Okay. At some point did you stand closer to  
25 Mr. Koziara?

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1 A No. Because I had machines and I was trying to get  
2 them -- keep them going too.

3 Q When Mr. Koziara got hit by the crossing plank, how  
4 close were you?

5 A I was probably 20/25 foot away from him.

6 MR. MORGAN: Your Honor, may I approach the  
7 witness?

8 THE COURT: You may, yes.

9 MR. MORGAN: Does the Court want the original?

10 THE COURT: No, that's all right. I've got a  
11 copy of the deposition.

12 BY MR. MORGAN:

13 Q Could you turn -- do you remember when I took your  
14 deposition in October of 2014?

15 A October? That would have been in La Crosse?

16 Q Yeah.

17 A Yeah. Yes.

18 Q Okay. Do you remember I had asked you some  
19 questions about the injury that day?

20 A Yes.

21 Q Okay. Could you turn to page 25, please. At line  
22 four I asked you a question:

23 "Question: You were standing right next to him,  
24 huh?"

25 And your answer was:

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1 "Answer: I was right next to him, but I didn't  
2 receive no discipline."

3 Do you see that?

4 A Yes.

5 Q And then I asked you at line seven:

6 "Question: So when you say you were standing right  
7 next to him, how close to him were you?"

8 And your answer was:

9 "Answer: Oh, probably three/four foot away. In  
10 the same vicinity."

11 Do you see that?

12 A Yes.

13 Q Okay. Does that help refresh your recollection as  
14 to how close you were standing when Mr. Koziara got hit  
15 by the crossing plank that afternoon or that morning?

16 A I believe I was that close to him at one point in  
17 time, but I think when they were prying the plank out I  
18 was further away.

19 Q Okay. So do you think your recollection was better  
20 when I took your deposition in October about how close  
21 you were or today?

22 A It's about the same.

23 Q Okay. Because in your deposition you say that you  
24 were standing only three or four feet from Mr. Koziara  
25 at the time he got hit; right?

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1 A I can't remember.

2 Q Okay. Did the crossing plank hit you?

3 A No, it did not.

4 Q Did it hit anyone else?

5 A No, it did not that I can recall.

6 Q Did you talk to Mike after the plank hit him in his  
7 left leg?

8 A Yes, I did.

9 Q Let me step back. Did you observe the plank hit  
10 him?

11 A I just seen him jump and I believe the plank hit  
12 him and I asked if he was okay.

13 Q And what did he tell you?

14 A He goes that it hit him and he don't think nothing  
15 is broken, but then when he lifted up his pant leg, it  
16 was bleeding pretty good.

17 Q Did you say anything else to him?

18 A I just asked if he wanted to go anyplace for help  
19 and he goes "I'll be okay."

20 Q Did you observe or overhear Mr. Koziara have any  
21 conversations with anyone else?

22 A No, I did not.

23 Q Did you continue working that day?

24 A Yes, I did.

25 Q Did you see Mike Koziara later that day?  
AL MITCHELL - DIRECT

1 A Later in the afternoon.

2 Q Right. Did you see him?

3 A Yes.

4 Q Did you talk with him?

5 A A little bit. I just asked him how it was and he  
6 goes it was sore.

7 Q Did you observe Mr. Koziara walking?

8 A No, I did not.

9 Q Did you ask Mr. Koziara if he had reported the  
10 injury?

11 A No, I did not.

12 Q At some point were you asked to report what you  
13 saw?

14 A Yes, I was.

15 Q Who made that request?

16 A It was a roadmaster and then it was some official  
17 from Minneapolis.

18 Q Did you submit a statement?

19 A I just give it over the phone what I seen.

20 Q Do you know who Mike Veitz is?

21 A Yes, I do.

22 Q And who is Mike Veitz?

23 A He used to be roadmaster north of La Crosse.

24 Q Did you have the occasion to work with Mr. Veitz on  
25 the various crews that you worked on?

AL MITCHELL - DIRECT

1 A Occasionally.

2 Q Was Mr. Veitz on site when Mr. Koziara got hit by  
3 the crossing plank?

4 A I can't recall.

5 Q Did you speak with Don Jones the day Mr. Koziara  
6 got hit by the crossing plank?

7 A Very little.

8 Q Do you recall what you discussed?

9 A It was more a job briefing about what we were going  
10 to do.

11 Q Do you know what an investigation is?

12 A Yes.

13 Q What's an investigation?

14 A That's when they try to reenact what happened to  
15 see if it could have been preventable.

16 Q Do you know whether BNSF started an investigation  
17 on Mr. Koziara following this incident on September 9th?

18 A I heard they did.

19 Q Do you know whether -- let me ask you this: Did  
20 BNSF start an investigation on you regarding this  
21 incident?

22 A No, they did not.

23 Q Do you know whether they started an investigation  
24 on anyone else other than Mr. Koziara as a result of  
25 this incident?

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1 A Not to my rec -- recall.

2 Q Do you know what an reenactment is, Mr. Mitchell?

3 A Yes. It's when you try to simulate the same thing  
4 that happened to get all the facts and how you could  
5 have did something different or not to prevent it.

6 Q Do you know whether Mr. Veitz conducted a  
7 reenactment of this incident?

8 A No, I do not.

9 Q Were you ever asked to attend a reenactment of this  
10 incident?

11 A No, I was not.

12 Q Were you ever disciplined at all for your role in  
13 this incident?

14 A No, I was not.

15 Q In your 19 years as an employee of BNSF, have  
16 maintenance workers to your knowledge taken old scrap  
17 ties?

18 A Yes, they have.

19 Q Have you?

20 A Yes, I have.

21 Q Are you aware, other than Mr. Koziara, of anyone  
22 ever getting fired for taking old used scrap ties?

23 A Not to my recall.

24 Q Are you aware of anybody other than Mr. Koziara  
25 ever getting disciplined, forgetting about termination,

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1 even disciplined for taking old ties, whether they're  
2 the regular ties or switch ties?

3 A Yeah, I've heard of people getting disciplined for  
4 it.

5 Q But not terminated.

6 A Right.

7 Q Were you ever disciplined for taking track ties?

8 A No, I wasn't.

9 Q You certainly weren't terminated for taking track  
10 ties.

11 A No, I was not.

12 Q Have you ever discussed the issue of taking old  
13 scrap ties with anyone from BNSF management?

14 A No, because I always got them from the contractors  
15 after they picked them up.

16 Q Okay. Did you ever talk to Mr. Veitz about taking  
17 old track ties?

18 A I have.

19 Q Okay. And what do you recall about that  
20 discussion?

21 A He said you should have a form filled out, but he  
22 goes there are getting so many laying around, he said if  
23 you need five or six, take them.

24 Q And when did he tell you that?

25 A Oh, jeepers, that would have been way before this  
AL MITCHELL - DIRECT

1 incident.

2 Q Okay. Approximate?

3 A 2000.

4 Q Okay. But before this incident.

5 A Right.

6 Q Do you recall anything else from your discussion  
7 with Mr. Veitz about the ties, taking old track ties?

8 A Back then, the biggest thing was don't be taking no  
9 new ones, but you can have the old ones that were taken  
10 out.

11 Q And that's what you understood the policy to be?

12 A That's correct.

13 MR. MORGAN: I don't have anything more for  
14 you. Thank you, Mr. Mitchell.

15 THE WITNESS: You're welcome.

16 THE COURT: Any cross-examination, Mr. Douglas?

17 MR. DOUGLAS: Yes, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. DOUGLAS:

20 Q Good afternoon, Mr. Mitchell. My name is Bruce  
21 Douglas and I'm an attorney for BNSF Railway. How are  
22 you doing this afternoon, sir?

23 A Nervous.

24 Q Yes, I see that. Well, let me try to be fairly  
25 brief, if I can. I'd like to clarify a few points with  
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1 you. First of all, let's cover the business about  
2 taking used ties. Okay? You've been with the railroad  
3 a long time; right?

4 A Correct.

5 Q On those occasions that you told Mr. Morgan that  
6 you took used ties, did you have permission from someone  
7 to take the ties?

8 A Most of the time I got them right from the  
9 contractors and they loaded them for me.

10 Q All right. So you weren't taking -- so on those  
11 occasions if you got them from the contractors, where  
12 did you get the ties -- where did you collect the ties  
13 from?

14 A Well, I was running Form B forms so they could take  
15 them off the track sides, and one day, he wanted to take  
16 the whole works that he picked up up to my place because  
17 they were running out of room, didn't have no place to  
18 put them, and I said well, I'll bring my trailer  
19 tomorrow and you can put some on it because I don't want  
20 too many, and they did that.

21 Q So on those occasions, were those what we called --  
22 are you familiar with the term *program ties*?

23 A Well, yeah, that's -- they would have been the old  
24 ones taken out, getting replaced with new.

25 Q So you got permission to take the ties from the  
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1 contractor; correct?

2 A That is correct.

3 Q Okay. And on other occasions did you ever get  
4 permission from your roadmaster or from your supervisor  
5 to take ties?

6 A Yes, I have.

7 Q Was there a time when you had to have a piece of  
8 paper in writing to get permission to take ties?

9 A At very first when I started there was, so I never  
10 took none. I didn't want the hassle.

11 Q Do you remember what that form was called?

12 A It was a Release Form.

13 Q If I -- would the term Release and Indemnity Form  
14 ring a bell?

15 A I've never actually seen the form. I just heard  
16 about it.

17 Q All right. So you knew there was a piece of paper  
18 involved.

19 A Right.

20 Q Okay. So let me ask you a question. Mr. Morgan  
21 asked you this question, he said did you ever know of  
22 people taking ties. I think the question was actually  
23 did you ever hear of maintenance workers taking scrap  
24 ties. Do you remember him asking you that?

25 A Yes.

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1 Q You answered yes to that question. But let me ask  
2 you, sir, did you know of any maintenance workers taking  
3 scrap ties without permission either from their  
4 supervisor or from the contractor?

5 A I'm sure there was.

6 Q But do you personally know of anyone who did that?

7 A Not offhand.

8 Q And you never took ties without permission, did  
9 you?

10 A No, I didn't.

11 Q Okay. Now Mr. Mitchell, let's clarify where -- you  
12 were present on September 9, 2010, at East Winona; is  
13 that correct?

14 A That's correct.

15 Q Do you remember the names of any of the other  
16 people who were there, the employees?

17 A Mike, and then there was Greg Zielke, Roadmaster  
18 Jones was there, and there was a few guys from the tie  
19 gang. Boy, it's hard to remember because a lot of guys  
20 are gone since then.

21 Q Certainly. When you said *Mike*, you're referring to  
22 Mr. Koziara?

23 A That's correct.

24 Q Thank you. The employees from the tie gang, were  
25 they waiting for Mr. Koziara's gang to take the crossing  
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1 planks up so they could do their work?

2 A I believe there was two or three machines waiting.

3 All the rest were further down the track.

4 Q Did you observe Mr. Zielke operating a front-end  
5 loader that day?

6 A Yes, I did.

7 Q Do you recall what he had on the end loader, what  
8 kind of thing? Did he have ties or forks or a bucket,  
9 do you remember?

10 A He had tines.

11 Q Tines.

12 A Yeah.

13 Q Like the fork; correct?

14 A Right.

15 Q Do you remember what kind of front-end loader it  
16 was?

17 A John Deere, I believe.

18 THE COURT: Mr. Douglas, can I ask you to clear  
19 the red marks by hitting the corner of the screen that  
20 says clear all?

21 MR. DOUGLAS: Okay. Thank you, Your Honor.  
22 Before we -- all right. Can you just call up just the  
23 picture part for me?

24 All right. We'd like to display -- this is the  
25 same photograph I used in opening. Any objection to  
AL MITCHELL - CROSS

1 displaying this, Counsel?

2 MR. MORGAN: No, Your Honor. Nope.

3 MR. DOUGLAS: Okay.

4 THE COURT: All right. If you would make a  
5 record so we can identify what this document is.

6 MR. DOUGLAS: Certainly. This is from Exhibit  
7 No. -- this is part of the Defendant's Exhibit 564. I'm  
8 just showing the witness the photograph part of it.  
9 Thank you.

10 BY MR. DOUGLAS:

11 Q Mr. Mitchell, I'll represent to you that this is a  
12 photograph that was taken at the reenactment. I  
13 understand from your earlier testimony you were not at  
14 the reenactment; correct?

15 A That is correct.

16 Q But taking a look at the machine, as you look at  
17 that machine, is that the machine that you saw  
18 Mr. Zielke operating on September 9, 2010?

19 A I don't remember.

20 Q Looking at the tines or the forks, is that the type  
21 of mechanism that was on the front of the machine?

22 A Yes, it was.

23 Q Okay. Thank you, sir. Looking at the person who  
24 is standing there at the corner of the screen wearing  
25 the hard hat and the orange shirt and the blue jeans,  
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1 that person was placed there for the reenactment, but as  
2 you're looking at that, is that where you remember  
3 Mr. Koziara was standing?

4 A It would be very close. I wouldn't say yes or no.

5 Q Okay.

6 A But it's close.

7 Q Close meaning give or take a foot or so?

8 A Correct.

9 Q Thank you. You were standing -- well, let me just  
10 ask you, sir. At the time you observed Mr. Koziara jump  
11 when the plank came to him, where were you standing?

12 A I was probably right about here. (Indicating)

13 Q Right about there.

14 A Yeah. I was on the other side of the rail.

15 Q And how far behind Mr. Koziara were you?

16 A When I seen him prying it, I was a lot further away  
17 than when we were first starting it.

18 Q So when Mr. Zielke applied pressure and was prying  
19 up the planks, where were you?

20 A When he was applying the pressure, I was back in  
21 here because I knew something was going to happen bad.

22 Q How far away from the front-end loader would you  
23 estimate that that second arrow is, sir?

24 A It would be right close to 12 feet.

25 Q All right. Now you indicated that you were  
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1 standing some 25 feet away. When was that, sir?

2 A That was right after it started to come up, because  
3 then I backed up.

4 Q Okay. So you saw Mr. Zielke lifting the plank and  
5 you recognized there might be some problem and you  
6 backed up further; correct?

7 A That's correct.

8 Q So is it correct then that at the time Mr. Zielke  
9 lifted the plank, you were 20/25 feet away from the  
10 front-end loader?

11 A Yes.

12 Q Thank you. Did you consider it to be safe to stand  
13 -- be standing where Mr. Koziara was standing while  
14 Mr. Zielke was operating that front-end loader?

15 A Well, actually the end that come up first was this  
16 end, and then when he applied more pressure, just kind  
17 of like all of a sudden jumped right up out of the  
18 ground.

19 Q But you, sir, backed up to 20/25 feet away; is that  
20 right?

21 A That's correct. But there was also a truck in  
22 there too.

23 Q And where was the truck located?

24 A Because that's what Mr. Koziara was leaning against  
25 when I noticed that it hit him.

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1 Q There was a truck there. Where was the truck, sir?

2 A That would have been up here because he backed up  
3 to the truck right up in here. Because he backed up to  
4 the truck and he sat on the bumper of it.

5 Q Was that the boom truck?

6 A Correct.

7 Q Is that where the people, the other people were  
8 working on repairing the hydraulic gun?

9 A I don't know nothing about that.

10 Q Okay. You said that you saw Mr. Koziara jump when  
11 the plank hit him?

12 A That's correct.

13 Q Did you actually see him hit -- strike that.

14 Did you actually see the plank strike Mr. Koziara  
15 or was your attention drawn to him because he jumped?

16 A I mostly drew to him because he jumped.

17 Q Is it possible, sir, that he might have tripped on  
18 the plank?

19 A Well, I don't think so, not that day.

20 Q And then when you looked at the leg and you saw it  
21 was red and it was bruised; is that correct?

22 A Correct.

23 Q And Mr. Koziara sat down a little bit and pulled  
24 his boot off and looked at it; correct?

25 A He just pulled his pants up. He didn't have to  
AL MITCHELL - CROSS

1 take the boot off.

2 Q I see. And did he continue working after that,  
3 sir?

4 A I couldn't tell you because I went with the rest of  
5 the gang because we had to get ready to load machines.

6 Q So after you saw Mr. Koziara checking his leg,  
7 that's the last you saw of him that day?

8 A I come back later and asked if it was okay.

9 Q And what did Mr. Koziara -- asked Mr. Koziara if it  
10 was okay?

11 A That's correct.

12 Q And what did he tell you?

13 A He said it's sore.

14 Q He didn't indicate -- he didn't tell you it was  
15 broken though?

16 A No.

17 Q One -- couple final points, sir. You mentioned at  
18 the beginning that you had an ops test last week; is  
19 that right?

20 A That's correct.

21 Q And you failed one of the ops test; is that right?

22 A That's correct.

23 Q If I use the term ops test, is that shorthand for  
24 operations test?

25 A That's correct.

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1 Q And how often are operations tests conducted for  
2 you, for example?

3 A A lot of times it's hard to say. This is the first  
4 time I've ever had somebody come out and actually talk  
5 to me about it.

6 Q Okay. You said you failed an OPS test; is that  
7 right?

8 A That's correct.

9 Q Because a flag fell down?

10 A That's correct.

11 Q As a result of that, you were not -- you did not  
12 receive any discipline for that though, did you, sir?

13 A No, I did not.

14 Q Okay. There's no investigation pending against  
15 you, is there?

16 A No, there's not.

17 Q That just goes on your record as having failed an  
18 ops test; correct?

19 A That's correct.

20 Q And during the course of the year, would you say  
21 that you go through a dozen ops tests?

22 A I would say some years there's more than others.

23 Q But it's a fairly routine thing to go through  
24 operations testing or ops tests; is it not?

25 A That's correct.

AL MITCHELL - CROSS



1 Q All right, sir. And that's not a disciplinary  
2 process as you understand it, is it, sir?

3 A No. It's just more or less to make you aware of  
4 that there is somebody watching.

5 Q Okay. Thank you, sir. One final thing. You were  
6 not asked to come to the reenactment; is that correct?

7 A That's correct.

8 Q Do you know why you weren't asked to come to the  
9 reenactment?

10 A Because I believe I was in southern Illinois.

11 Q So you were a long distance away; correct?

12 A Correct.

13 Q Does that seem unusual to you that because you were  
14 that far away, you weren't invited to come to the  
15 reenactment?

16 A That part of the company I don't know how they do  
17 that.

18 Q But you were asked to provide a report or some  
19 information to Mr. Veitz; is that correct?

20 A I didn't give nothing to Mr. Veitz, I gave it to a  
21 guy out of the Cities.

22 Q Okay. But you did provide some type of a report;  
23 correct?

24 A That's correct.

25 Q So -- thank you very much.

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1 MR. DOUGLAS: All right. I have no further  
2 questions. Thank you. (4:38 p.m.)

3 THE COURT: Does the cross-examination prompt  
4 any redirect?

5 MR. MORGAN: Yes. Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. MORGAN:

8 Q Mr. Mitchell, have you talked to anybody about the  
9 fact that you were going to give testimony here in the  
10 last several weeks to a month?

11 A Just you.

12 Q Okay. You and I talked?

13 A Well, whoever called me on the phone.

14 Q Okay. About arranging a time for you to show up?

15 A Right.

16 Q Anybody from BNSF that you've talked to about your  
17 testimony?

18 A I just told the roadmaster I had to come down here  
19 Monday, possibly Tuesday.

20 Q And which roadmaster was that?

21 A Ben Burnell Zachary (ph).

22 Q And did he say anything to you?

23 A He wanted to know what it was for.

24 Q And did you tell him?

25 A Yes.

AL MITCHELL - REDIRECT

1 Q And what did he say?

2 A You have to go.

3 Q Is he the only one you talked to about giving  
4 testimony at this trial?

5 A Then -- well, I told Sheldon Everson that I'd be  
6 gone today so they'd have to find somebody to take my  
7 place.

8 Q Who is Sheldon Everson?

9 A He's the other foreman on the construction gang.

10 Q Anyone else?

11 A No, that's it.

12 Q Okay. I just want to talk a little bit more. You  
13 made some other arrows on that photograph that  
14 Mr. Douglas was showing you and you talked a little bit  
15 more about where you were standing when Mike got hit  
16 with the plank; correct? Do you recall that?

17 A Well, I didn't actually see the plank hit him, but  
18 I think what you drew my attention is when he did jump  
19 back.

20 Q Right. But my questions were that Mr. Douglas  
21 asked you some questions about where you were standing?

22 A Right.

23 Q Can you turn to page 26 of your deposition, please.  
24 Starting at line three. Now when I took your  
25 deposition, Mr. Mitchell, did you swear to tell the

AL MITCHELL - REDIRECT

1 truth?

2 A Yes.

3 Q Okay. Did you try your best to tell the truth that  
4 day?

5 A Yes.

6 Q Okay. At line three I say:

7 "Question: About three feet."

8 And you say "Correct."

9 Is that right?

10 A That's right.

11 Q And then I say: "You were about this distance from  
12 him when the injury occurred. Farther away. Closer."

13 And your answer is what?

14 A "Probably a little bit closer."

15 Q "Because we was talking"; right?

16 A Correct.

17 Q So then I ask you: "So maybe two feet? Two to  
18 three?"

19 And what is your answer?

20 A "Two to three."

21 Q And then my question is: "At the time he got  
22 injured." And what is your answer?

23 A "Correct."

24 Q All right. So that was your testimony under oath  
25 in October of 2014 when I was asking you questions about  
AL MITCHELL - REDIRECT

1 how close you were standing to Mr. Koziara at the time  
2 the plank hit him; right?

3 A Correct.

4 MR. MORGAN: I don't have anything else.

5 THE COURT: Thank you. Before you step down  
6 I'm going to check in with the jury to see if the jury  
7 has any questions for Mr. Mitchell.

8 MR. DOUGLAS: Your Honor, if I may.

9 THE COURT: Any questions? Okay. Very  
10 briefly, Mr. Douglas.

11 RE CROSS-EXAMINATION

12 BY MR. DOUGLAS:

13 Q Mr. Mitchell, just a couple of questions. I think  
14 you just told us that -- I want to be clear. You didn't  
15 actually see the plank strike Mr. Koziara; correct?

16 A No, I did not.

17 Q Thank you, sir. And you are appearing here today  
18 voluntarily without any subpoena or any order of the  
19 Court to be here; is that correct, sir?

20 A That is correct.

21 MR. DOUGLAS: Nothing further, sir. Thank you.

22 THE COURT: Thank you, Mr. Mitchell. Drive  
23 carefully. You're finished.

24 THE WITNESS: Thank you.

25 (Witness excused at 4:32 p.m.)  
AL MITCHELL - RE CROSS

1 THE COURT: All right. I think we were  
2 prepared to resume with Mr. Koziara; is that correct?

3 MR. DOUGLAS: Yes, Your Honor.

4 THE COURT: All right. Mr. Douglas, you may  
5 begin your cross-examination of Mr. Koziara.  
6 Mr. Koziara, you can take the witness stand again.

7 **MICHAEL KOZIARA, PLAINTIFF, RESUMES,**

8 THE COURT: Mr. Douglas, you can clear the  
9 arrows again, if you would.

10 CROSS-EXAMINATION

11 BY MR. DOUGLAS:

12 Q Good afternoon, sir.

13 A Good afternoon.

14 Q I think we've met before at your deposition,  
15 Mr. Koziara, so I will -- I don't think it's necessary  
16 for me to introduce myself again. All right? I would  
17 like to follow-up and ask you some questions, and I know  
18 Mr. Morgan asked you a lot of questions and he was very  
19 thorough, but I do have some cross-examination for you.

20 You've worked for Burlington Northern for a long  
21 time, didn't you, sir?

22 A Yes, I did.

23 Q A little over thirty years?

24 A Correct.

25 Q And I take it that you liked working for the  
MICHAEL KOZIARA - CROSS

1 railroad; is that correct?

2 A That's correct.

3 Q You enjoyed your job?

4 A Yes, I did.

5 Q Now during the years that you worked at BNSF, and  
6 maybe not for the entire time, but perhaps, were you a  
7 member of a labor organization?

8 A Yes, I was.

9 Q You were a member of the union; correct?

10 A Yes, sir.

11 Q And is that the Brotherhood of Maintenance of Way  
12 Employees Division?

13 A Correct.

14 Q The acronym is the BMWED; correct?

15 A That's correct.

16 Q And that's affiliated with the International  
17 Brotherhood of Teamsters; correct?

18 A Correct.

19 Q And you joined -- became a member of the union  
20 shortly after you started at BNSF or a predecessor  
21 company; correct?

22 A Correct.

23 Q Actually when you joined the railroad, it was  
24 Burlington Northern; is that correct?

25 A That's correct.

MICHAEL KOZIARA - CROSS

1 Q At some later time, Burlington Northern merged with  
2 the Sante Fe; is that correct?

3 A That's correct.

4 Q If I suggest to you that that was in about 1996,  
5 does that seem consistent with your understanding?

6 A Yes, somewhere in that time frame.

7 Q Thank you. Now during the years that you worked at  
8 BNSF, most of the time I think your official position or  
9 your title was -- well, let me double-check this. Was  
10 trackman your official title or position? Welder or  
11 grinder, which would it be?

12 A Trackman, and then I was mostly a grinder or a  
13 welder.

14 Q Okay. So let's just, for the jury's sake because I  
15 think we've glossed over it on your direct examination.  
16 So when we say a trackman, what kind of a position is  
17 that? What do you do?

18 A A trackman as far as a basic laborer? Laborer  
19 just, when I first started, was pounding spikes, putting  
20 on anchors, general track maintenance, you know, change  
21 ties out, crip switches. It was all sorts of things to  
22 do to fix the tracks.

23 Q So when we talk about the maintenance of way, when  
24 we talk -- the word way is kind of referring to the  
25 track areas, the right-of-way through which the tracks

MICHAEL KOZIARA - CROSS



1 go; is that right?

2 A That's the correct termination.

3 Q Thank you, sir. So your group of people, the whole  
4 Maintenance of Way Division is responsible for track  
5 maintenance; correct?

6 A That's correct.

7 Q And that can include a variety of things; correct?

8 A Correct.

9 Q So you have some employees in that division who  
10 would actually lay the tracks; correct?

11 A Correct.

12 Q You have people who would actually lay the ties;  
13 correct?

14 A Correct.

15 Q Other people who would put in the spikes and the  
16 plates that hold the rails to the track bed; correct?

17 A Correct.

18 Q Other people who bring in the ballast and service  
19 the ballast, which is the gravel that we see; correct?

20 A Correct.

21 Q And then you have other people who actually do some  
22 welding for the rails; correct?

23 A Correct.

24 Q And you have people who do the grinding. And I  
25 take it the grinding is to make the rails nice and

MICHAEL KOZIARA - CROSS

1 polished in certain places, but to make them line up  
2 where they butt together; correct?

3 A Correct.

4 Q And you were trained in all those things over the  
5 years by BNSF; correct?

6 A Yes, I was.

7 Q And in fact, the railroad sent you at one time to  
8 out-of-state classes to become certified. I believe  
9 they were classes in welding, were they not, sir?

10 A Correct.

11 Q So is it fair to say, sir, that the railroad did  
12 make some investment in you over the years that you  
13 worked there?

14 A Yes, they did.

15 Q Now at some point in time you became a foreman; is  
16 that correct?

17 A Correct.

18 Q Now, is that a management position, sir?

19 A No, it's not. It's a scheduled employee.

20 Q That's a new term. I think we want to use --  
21 explain that to the jury. So what's your understanding  
22 of the term scheduled employee, sir?

23 A Scheduled employee is somebody employed by the or  
24 the unionized worker for the railroad.

25 Q So when we talk about management or officers,  
MICHAEL KOZIARA - CROSS

1 that's -- those are people like, for example, Roadmaster  
2 Veitz; correct?

3 A Correct.

4 Q And when we say scheduled employees, that would be  
5 people like yourself and others who are covered by a  
6 Collective Bargaining Agreement?

7 A Correct.

8 Q The foreman position is a Collective Bargaining  
9 Agreement position, isn't it, sir?

10 A Correct.

11 Q And it's done based on seniority and  
12 qualifications; is that correct?

13 A Correct.

14 Q And there are foreman positions. Those jobs are  
15 posted and bid on; is that right?

16 A Correct.

17 Q And if you're interested in that job, you sign a  
18 posting and depending on your seniority date or  
19 basically your hired date and your qualifications, you  
20 might get that job; right?

21 A Correct.

22 Q At least you'd get that job over all the senior  
23 people -- less senior people; correct?

24 A Correct.

25 Q Thank you. Is there an additional bump in pay for  
MICHAEL KOZIARA - CROSS

1 a foreman's position under the Collective Bargaining  
2 Agreement?

3 A A bump in pay as you mean as far as wage scale?

4 Q Yes, sir.

5 A Yes.

6 Q Okay. Approximately -- can you tell us in the year  
7 2010 when you were a foreman, what was the pay  
8 differential between being a foreman and a member of the  
9 crew that you were supervising in dollars per hour?

10 A I believe the foreman was \$24.10. Truck driver was  
11 like 22. Laborer I don't remember.

12 Q All right. So there are several dollars involved  
13 in being a foreman; correct?

14 A Correct.

15 Q Now you testified earlier, I believe, and I want to  
16 be clear on this, that the foreman who supervises --  
17 you're supervising the men on the crew that day;  
18 correct?

19 A Correct.

20 Q And not to be sexist about this, but if there are  
21 any women on the crew, you're supervising them as well;  
22 correct?

23 A Correct.

24 Q When you're the foreman, I think you had told us  
25 that you do have responsibility for the safety of the  
MICHAEL KOZIARA - CROSS

1 crew; is that correct?

2 A That's correct.

3 Q And that's part and parcel of your job; right?

4 A Correct.

5 Q You're familiar with the Maintenance of Way  
6 Operating Rules, are you not, sir?

7 A Yes, I am.

8 Q That's one of those great big booklets that your  
9 attorneys have shown us. They've put it up on the  
10 screen, and I'm not going to do that right now. But if  
11 I refer to those as M-O-W-O-R, MOWOR, is that okay with  
12 you?

13 A That will work.

14 Q Is that how you folks refer to it out in the field?

15 A Yes.

16 Q Now you get -- you're familiar with them because  
17 you actually receive training on those rules, do you  
18 not?

19 A Once a year.

20 Q Okay. And when you do that training, how is that  
21 training conducted? What's the format for the training?

22 A We have a safety guy show up. He gives a class on  
23 some of the rules, some of the new protections or  
24 procedures they have, and we take a test. You have to  
25 pass with 90 percent and you're qualified.

MICHAEL KOZIARA - CROSS

1 Q That's a pencil and paper test?

2 A Yes, it is.

3 Q That's administered at one of the locations, a  
4 section house of the depot or something like that?

5 A It's usually open book.

6 Q Okay. But -- thank you. Where is the test  
7 typically given?

8 A Usually at -- we were given it up at Drugan's,  
9 which is -- it wasn't at the depot, it was at a facility  
10 that they used, a place where you can get something to  
11 eat later.

12 Q Oh, okay. So they would have an offsite meeting,  
13 you'd take the training, you'd take a test, and then  
14 they'd have lunch or something like that?

15 A That's correct.

16 Q Okay, thank you. To your knowledge, sir, are  
17 records of the tests that you're given and either your  
18 pass/fail entered into your permanent record with BNSF?

19 A I believe they are.

20 Q Are you familiar with a document known as your  
21 employee transcript, sir?

22 A Yes.

23 Q And are you -- do you know whether or not your  
24 history of testing goes into your employee transcript?

25 A I believe it is.

MICHAEL KOZIARA - CROSS

1 Q Now isn't it true, sir, that as a foreman that one  
2 of the -- strike that.

3 Isn't it true, sir, as a foreman that you had to  
4 carry around with you in your truck or car a copy of the  
5 MOWOR rules?

6 A Yes.

7 Q Did you have to carry around with you any other  
8 rules in your role as a foreman?

9 A Not to my knowledge.

10 Q You're familiar with some of the other rules that  
11 were in place at BNSF when you worked there; correct?

12 A Yes.

13 Q Were you familiar with the engineering rules for  
14 your division?

15 A Yes.

16 Q Did you carry a copy of the engineering rules with  
17 you?

18 A I think I kept my book in the depot.

19 Q And when we're talking about the depot, let's  
20 clarify for everybody which depot are we talking about?

21 A This was the one at East Winona or the Winona  
22 Junction depot.

23 Q Okay. I want to be clear on that because the two  
24 locations are actually kind of far apart from one  
25 another, aren't they?

MICHAEL KOZIARA - CROSS

1 A Couple miles.

2 Q Yeah. Would it be okay if I -- I'd like to --

3 MR. DOUGLAS: Do you have any objection to my  
4 displaying this?

5 MR. MORGAN: No, I don't.

6 MR. DOUGLAS: We'll see if it works.

7 BY MR. DOUGLAS;

8 Q Mr. Koziara, do you remember when we took your  
9 deposition in September of last year?

10 A Yes, sir.

11 Q Do you remember seeing this exhibit, this Google  
12 Earth map?

13 A Yes, sir.

14 Q Okay. So --

15 THE COURT: Mr. Douglas, why don't you put a  
16 note in the record here that indicates what exhibit  
17 we're looking at.

18 MR. DOUGLAS: Certainly. Exhibit number?  
19 Thank you. I'll mark it right now because it may not  
20 be, sir. I'm marking this as Defendant's Exhibit 658.  
21 I'd move the admission of 658.

22 THE COURT: Any objection?

23 MR. MORGAN: No objection.

24 THE COURT: Fine. 658 is admitted. Go ahead.

25 MR. DOUGLAS: Thank you.

MICHAEL KOZIARA - CROSS



1 BY MR. DOUGLAS:

2 Q Mr. Koziara, just to be clear, I'm just using this  
3 to identify the locations for the jury. Is that your  
4 handwriting where it says here East Winona or Winona?

5 A Winona, that is.

6 Q And you wrote that down for me at the deposition;  
7 correct?

8 A That's correct.

9 Q Okay. And it's circled, so if we look at this --  
10 thank you. Pardon me. So this area here, I'm going to  
11 point the pen to that. You can't really see detail, but  
12 that would be East Winona; correct?

13 A Correct.

14 Q And there are milepost designations for some of  
15 these places along the track, is there not?

16 A There is.

17 Q Do you know where the mileposts begin? Where is  
18 the zero point?

19 A La Crosse. Well, there's a zero point that starts  
20 further up, but for the northern section it starts at  
21 La Crosse.

22 Q Okay. What's the milepost in La Crosse?

23 A Starts at 300.

24 Q 300. Okay. So these mile -- so if we say this is  
25 milepost what, 325.7 at East Winona; is that correct?

MICHAEL KOZIARA - CROSS

1 A That is correct.

2 Q So that's 25.7 miles from La Crosse, wherever the  
3 marker is; right?

4 A Yes.

5 Q And this is going -- if we look at this, we're  
6 pointing up. This is pointing up where the pen point  
7 is, that's north. So this is the BNSF track here;  
8 correct?

9 A That's correct.

10 Q And that's moving up over to this other black  
11 circle where it says *Winona Junction*; correct?

12 A That's correct.

13 Q And that's your handwriting up here where it says  
14 *Winona Junction*.

15 A That's correct.

16 Q What is the milepost for Winona Junction, if you  
17 remember?

18 A 328.3 is the -- would be the depot.

19 Q So it's two-and-a-half/three miles, something like  
20 that between the two points; correct?

21 A That's correct.

22 Q All right. Thank you, sir. I just wanted to be  
23 clear. So when you say there's this depot or -- is it  
24 sometimes, I believe, sir, that you refer to it as the  
25 section house?

MICHAEL KOZIARA - CROSS

1 A That's correct.

2 Q Where is it located?

3 A At 3 --

4 Q I can put it back. I mean is it located at East  
5 Winona or Winona Junction?

6 A It's located at Winona Junction.

7 Q Okay. So there's a building up there where you had  
8 an office or you have office space to use; correct?

9 A That's correct.

10 Q And you were a foreman. Did you have a private  
11 office or just a desk?

12 A Basically a desk.

13 Q Okay. So you had your own desk in there. How big  
14 a place is the section house?

15 A I would say it was -- I shared it with the -- you  
16 want the whole building or just the section part I had?

17 Q That's a fair point. Just generally speaking,  
18 what's the size of the building? So we get some idea.

19 A I would say the building is probably twenty by  
20 twelve maybe; not even.

21 Q All right. And is that the location where you  
22 might report to work in the mornings?

23 A Yes, that was the place.

24 Q Okay. Did you customarily report to work in the  
25 mornings?

MICHAEL KOZIARA - CROSS

1 A Yes.

2 Q And your schedule was Mondays through Fridays  
3 normally?

4 A That's correct.

5 Q So when you said that you had a conference call in  
6 the morning, were you conducting -- were you taking that  
7 conference call at the office at Winona Junction?

8 A That's correct.

9 Q So I just wanted to clarify that. And these  
10 conference calls that you have, are they regular  
11 occurrences?

12 A Yes, they are.

13 Q Who conducted those conference calls? I'll focus  
14 my time frame on let's say the summer and fall of 2010.

15 A It would be the roadmaster would conduct the calls,  
16 and then the dispatcher would butt in and see what we  
17 were doing after we got the news in the morning.

18 Q Okay. When you say *the roadmaster*, would that be  
19 Roadmaster Veitz?

20 A That's correct.

21 Q Because he was in charge of your section, the  
22 La Crosse section that you worked in; correct?

23 A That's correct.

24 Q And you reported to him?

25 A That's correct.

MICHAEL KOZIARA - CROSS

1 Q And these calls that you had in the mornings, what  
2 time did they start?

3 A They started at seven o'clock.

4 Q How long did they typically last?

5 A Twenty-five minutes to a half hour, depending on  
6 when the dispatcher got on.

7 Q What was the purpose of these calls, sir?

8 A They were basically job briefings so we'd know  
9 where we were going in the day or he would ask us what  
10 we were doing, and then the dispatcher would get on  
11 there to make sure he knew what we were doing so we  
12 could utilize track time.

13 Q Were these -- I'll use this term -- sort of  
14 all-hands calls; in other words, every employee was  
15 expected to participate in the calls?

16 A Yes.

17 Q So that included not only the roadmaster and  
18 yourself, but everybody on your crew was expected to  
19 either dial in or be present for the call; correct?

20 A Correct.

21 Q Did these calls sometimes include alerts or  
22 warnings on safety issues?

23 A Not that I remember.

24 Q Did sometimes these calls include information on,  
25 oh, problems that had arisen on the tracks overnight or

MICHAEL KOZIARA - CROSS

1 something like that?

2 A Yes, if they had a derailment or something like  
3 that they would mention it.

4 Q And one of the purposes of the calls, is this where  
5 your assignments then got handed out?

6 A Sometimes.

7 Q Sometimes you had your assignments previously;  
8 correct?

9 A Sometimes I knew what I was going to do, that's  
10 correct.

11 Q All right. During the time that you worked at  
12 BNSF, you were also active in your union, the BMWED;  
13 correct?

14 A Correct.

15 Q I think you told us at one point you were the  
16 president of the Local; is that correct?

17 A That's correct.

18 Q What Local number was that, sir?

19 A Local 509.

20 Q Where was Local 509's headquarters?

21 A They weren't really headquartered anywhere unless  
22 you wanted to call the Secretary/Treasurer's house the  
23 headquarters.

24 Q You had been active in the union for quite some  
25 time; correct?

MICHAEL KOZIARA - CROSS

1 A Yes.

2 Q What positions prior to becoming the president of  
3 the Local had you held?

4 A I held the Legislative Director's job for the State  
5 of Wisconsin since 1999.

6 Q Did you hold any other officer positions in your  
7 Local like Vice President or Treasurer or something like  
8 that?

9 A No.

10 Q The Legislative Director job, that was a part-time  
11 job with the union; correct?

12 A Correct.

13 Q That was in addition to your work at BNSF?

14 A Correct.

15 Q The job of the Legislative Director was actually a  
16 paid position; correct?

17 A Correct.

18 Q What did that job entail?

19 A Whatever the national director wanted or the  
20 president of the international wanted to do on getting  
21 bills passed or any kind of safety issues or if there  
22 was, you know, meeting up with other unions, that was my  
23 job.

24 Q Okay. I'd like to switch gears on you a little bit  
25 at this point. There are a number of people who either  
MICHAEL KOZIARA - CROSS

1 will testify or whose names have been mentioned in this  
2 case and I just wanted to ask you some questions about  
3 those individuals. All right?

4 A Okay.

5 Q The first would be Michael Veitz. He was your  
6 roadmaster; correct?

7 A Correct.

8 Q How would you characterize or how would you  
9 describe your relationship with Michael Veitz during the  
10 years you worked under him?

11 A We tried to be professional, but we had -- it was  
12 strenuous at times.

13 Q Strenuous in which way, sir?

14 A I guess I wasn't on the buddy list. I just did my  
15 job the best I could.

16 Q You weren't on the buddy list?

17 A Correct.

18 Q And what does that mean, sir?

19 A It means I wasn't in his favorite group of people.

20 Q And do you have some idea why you weren't in his  
21 favorite group of people?

22 MR. MORGAN: I'm going to object. That calls  
23 for speculation.

24 THE COURT: I'll allow it.

25 THE WITNESS: I wasn't there -- I wasn't there  
MICHAEL KOZIARA - CROSS



1 all the time so he could count on me when -- most of the  
2 time I was there to work. I would come out any time I  
3 could. But if I was on my Legislative Director's job or  
4 something, I wasn't there for him.

5 BY MR. DOUGLAS:

6 Q So if Mr. Veitz had -- are you suggesting that  
7 Mr. Veitz had a beef with you because you were absent  
8 for your legislative duties?

9 A He's had a problem with it before.

10 Q Any other problem with Mr. Veitz?

11 A No. He just has a little temper, that's all.

12 Q Did he ever use his temper on you?

13 A Tried.

14 Q What was he -- on that occasion what was he angry  
15 about?

16 A At the time we had a -- I had a machine break down  
17 and the hydraulics sprayed all over me and he was more  
18 upset about the machine than me being sprayed with  
19 hydraulics fluid.

20 Q And when was this, sir?

21 A I don't remember. It was in the past. 1990,  
22 somewhere in there.

23 Q 1990? Okay. So that would be -- well, by today's  
24 standards, that would be what? 30 -- 24 years ago?

25 A Just remember you asked me.

MICHAEL KOZIARA - CROSS

1 Q I am. I'm just trying to make sure when you said  
2 1990, we really meant 24 years ago. All right. Any  
3 other issues with Mr. Veitz?

4 A Not to my knowledge.

5 Q You said he tried to act professional; is that  
6 right?

7 A We were in a really good basis. I was a good  
8 worker I thought.

9 Q And did you consider him to be a good roadmaster?

10 A He was fair, I guess.

11 Q Are you familiar with the name Daniel Rankin?

12 A Yes.

13 Q Have you ever met Mr. Rankin?

14 A Yes, I have.

15 Q Okay. When did you meet Mr. Rankin?

16 A About three or four years ago at a meeting. It was  
17 a meeting they had for trying to keep people. They had  
18 a bunch of psychologists there and they were going -- it  
19 was kind of like a foremans school for leadership.

20 Q And you were included in that class.

21 A Yes.

22 Q Did you ever have any problems with Mr. Rankin?

23 A I've only met him a couple times.

24 Q And one of the times being at the leadership class;  
25 correct?

MICHAEL KOZIARA - CROSS

1 A That's correct.

2 Q Do you know a gentleman by the name of Gary  
3 Wischover?

4 A Yes, sir.

5 Q And who was Mr. Wischover?

6 A Mr. Wischover was a division engineer about the  
7 time I left after they replaced Brian Chatt (ph). He  
8 used to be the computer guy. That's all I really knew  
9 about him.

10 Q Did you ever have any problems or any disagreements  
11 with Mr. Wischover?

12 A I never really talked to him.

13 Q All right. How about William Barbee? Do you know  
14 him?

15 A Yes, I do.

16 Q Okay. What -- who is he?

17 A Bill Barbee is a roadmaster.

18 Q And is he -- what's his current job, if you know?

19 A He's roadmaster in La Crosse.

20 Q Just to kind of speed this up, at some point  
21 Mr. Veitz retired from the company; is that correct?

22 A That's correct.

23 Q Is it your understanding that Mr. Barbee took his  
24 position then?

25 A That's correct.

MICHAEL KOZIARA - CROSS

1 Q Did you ever have any problems or issues with  
2 William Barbee?

3 A When he first got here, he was a welding  
4 supervisor, yes.

5 Q Was Mr. Barbee in any way involved in the  
6 disciplinary action and dismissal that BNSF took against  
7 you?

8 A I have no knowledge of it.

9 Q Thank you, sir. Do you know a gentleman by the  
10 name of Jerry Weis?

11 A Yes, I do.

12 Q Did I pronounce that correctly?

13 A Weis.

14 Q Weis. Thank you. And who is Mr. Weis?

15 A Mr. Weis is a welder for the BNSF, welding foreman.  
16 He's also the secretary/treasurer of our Local.

17 Q Mr. Weis is a close friend of yours, is he not,  
18 sir?

19 A Yes, he is.

20 Q As a matter of fact, you've been friends since you  
21 were young men; is that right?

22 A Yes.

23 Q Do you know a gentleman by the name of David  
24 Bruring?

25 A Yes.

MICHAEL KOZIARA - CROSS

1 Q Who is David Bruring?

2 A He's a BNSF employee.

3 Q Just a co-worker of yours?

4 A That's correct.

5 Q Is he also in the Maintenance of Way Division?

6 A Yes, he is.

7 Q Was he ever working on your crew?

8 A He was a truck driver at one time.

9 Q Was Mr. Bruring involved in either of the incidents  
10 that we've had testimony on today?

11 A He wasn't involved in anything that I know of.

12 Q Let me rephrase that for you. Was he present at  
13 either of the incidents, the one on September 9th at  
14 East Winona or the earlier one at Winona Junction?

15 A He was present at Winona Junction. He was doing  
16 ties.

17 Q So he was present on the day that the ties were  
18 given away to the farmer; correct?

19 A Correct.

20 Q Did you have any discussion with Mr. Bruring on  
21 that day?

22 A No, I did not, other than job briefing probably.

23 Q Okay. Do you know a gentleman by the name of  
24 Bradley Underhill?

25 A Yes, I do.

MICHAEL KOZIARA - CROSS

1 Q Who is Brad Underhill?

2 A Brad Underhill is a employee of BNSF and he holds a  
3 foreman's position. He was my relief foreman at the  
4 time during the fall of 2010.

5 Q So in 2010, September of 2010, did Mr. Underhill  
6 work on your crew as a crew member or did he do  
7 something else and then filled in as a foreman? Would  
8 you please help us understand that.

9 A He would work as -- he -- multiple things. When  
10 they needed him for doing something else, he would fill  
11 in that position. If we had extra people, we didn't  
12 need him. Otherwise, if I was gone, he took over for  
13 me.

14 Q Okay. Did he have a particular job title or main  
15 job?

16 A He was a foreman just like me.

17 Q Okay. So he was supervising a crew?

18 A Correct.

19 Q What crew was he supervising, sir?

20 A Same one I was.

21 Q Okay. So were the two of -- I'm just trying to  
22 understand this. Were the two of you interchangeable on  
23 the crew? Is that how it worked?

24 A That's correct.

25 Q All right. Thank you. Do you know a gentleman by  
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1 the name of Chris Davis?

2 A Yes, I do.

3 Q Who is Chris Davis?

4 A Chris Davis is the Local chairman and he's also a  
5 track inspector for BNSF.

6 Q And was Mr. Davis present with you during any of  
7 the investigative hearings that were held in 2010  
8 concerning these matters?

9 A Yes, he was.

10 Q And was he the union representative that came to  
11 the hearing to represent you; is that right?

12 A For the first one, yes.

13 Q For the first one. And he came along with  
14 Mr. Willing for the first one; correct?

15 A Don Willing, yes.

16 Q All right. Thank you. Do you know Greg Zielke?

17 A Yes, I do.

18 Q Who was Greg Zielke?

19 A He's employed for the Burlington Northern, but he's  
20 also -- he was the only end loader operator at the time.

21 Q Okay.

22 A And he's a friend of mine.

23 Q It's easy to get tongue tied at the end of the day,  
24 sir.

25 A Yeah.

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1 Q All right. Continuing on. If I may, let me direct  
2 your attention to an incident that your counsel asked  
3 you questions about that happened back in about 1988 I  
4 think was the year. Did I get that right?

5 A That's correct.

6 Q So you had an injury in -- an on-the-job injury in  
7 1988; is that correct?

8 A That's correct.

9 Q What's the injury again?

10 A I had a contusion and bruises. I had just slipped  
11 in a hole and I was all banged up from it.

12 Q And you went to report that injury; is that right?

13 A That's correct.

14 Q Did you fill out a written injury report?

15 A I did.

16 Q You gave it to your roadmaster; correct?

17 A I gave it to the foreman who gave it to the  
18 roadmaster.

19 Q Thank you for the correction. And who was the  
20 foreman, if you remember?

21 A I can see his face. I can't remember his name.

22 Q All right. Who was the roadmaster?

23 A CD Schoonover.

24 Q Okay. So you said that somebody ripped up your  
25 report. Who was that?

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1 A That was the roadmaster, Mr. Schoonover.

2 Q You then told us that Mr. Schoonover -- the  
3 roadmaster got in more trouble than you did. What  
4 happened to the roadmaster because he ripped up your  
5 report?

6 A Nothing because I didn't press charges against him  
7 or anything.

8 Q Ahh. What would have happened to him had you  
9 pressed those charges, sir?

10 MR. MORGAN: I'm going to object. Calls for  
11 speculation.

12 THE COURT: You'll have to lay some foundation  
13 for that.

14 MR. DOUGLAS: Certainly.

15 BY MR. DOUGLAS:

16 Q You testified that Mr. Schoonover or -- strike  
17 that.

18 The roadmaster got in more trouble than you did  
19 because he ripped up the report; correct?

20 A Correct.

21 Q What is the basis for your saying that he got in  
22 more trouble than you did?

23 A Well, after he threatened me with 30 days off and  
24 then found out later after he had tore up the thing and  
25 the union guy came over and said if you really wanted to  
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1 press this issue he would probably be terminated for  
2 tearing up that injury report.

3 THE COURT: And who was the union guy who told  
4 you this?

5 THE WITNESS: Gather Wischover -- Gary Holder.  
6 And he's retired. He has been retired for many, many  
7 years.

8 THE COURT: And what was his position in the  
9 union?

10 THE WITNESS: He was a -- he was the Vice  
11 General Chairman at the time.

12 BY MR. DOUGLAS:

13 Q So it was your understanding that if you had  
14 pressed charges against that roadmaster -- Schoonover is  
15 his name?

16 A Correct.

17 Q -- that you might have actually caused him to be  
18 discharged by the railroad; correct?

19 A Correct.

20 Q Because what he did was wrong; right?

21 A Correct.

22 Q I take it that your report got written up and  
23 processed some time later; is that right?

24 A I don't know what happened. I know I kept a copy,  
25 but I had a claim agent come by later and that was it.

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1 Q So your claim was processed and then you got taken  
2 care of; is that right?

3 A That's correct.

4 Q All right. Were you disciplined for anything in  
5 connection with making that injury report?

6 A No.

7 Q Now Mr. Koziara, I'd like to turn your attention  
8 now to the events of September 9, 2010. I think we've  
9 already heard some testimony on that, but let me be sure  
10 that I've got it down pat.

11 What time did you start working that morning, if  
12 you can recall?

13 A It would be seven o'clock.

14 Q Did you report to your office or section house at  
15 Winona Junction?

16 A That's correct.

17 Q How long were you at the section house at Winona  
18 Junction?

19 A It would have been after eight o'clock.

20 Q So for a little over an hour?

21 A That's correct.

22 Q During that time was there a conference call that  
23 morning?

24 A There was.

25 Q And who, if you recall, who led the conference  
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1 call?

2 A Mike Veitz.

3 Q Who else was on the conference call, at least from  
4 your group of people?

5 A What do you mean from my group of people? You mean  
6 in my own section?

7 Q Let me -- yes, sir. I meant from your crew or your  
8 section, who else was on the call if you know?

9 A Well, it would have been Brad Underhill, Elvin  
10 Smothers. That would have been my crew at the time.

11 Q Okay. Mr. Smothers is now deceased; correct?

12 A That's correct.

13 Q So is it fair to say that you spent about an hour  
14 at the section house; correct?

15 A Or more.

16 Q Or more. All right. Did you conduct a briefing  
17 with any of the people on your crew prior to leaving the  
18 section house?

19 A Yes.

20 Q With whom did you conduct the briefing?

21 A Brad. I told him to go put the forms out for my  
22 Form B, and Elvin, to tell him where to go.

23 Q I want to make sure I understood that. When you  
24 told him to go put the boards out?

25 A Yes.

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1 Q Okay. So what does that mean?

2 A That means he has to go set the boards up. The  
3 Form B boards had to be set up.

4 Q Would you please explain to us and help us  
5 understand what is the Form B board?

6 A The Form B boards is a protection I had requested  
7 the day before so the train traffic would know the day  
8 of the work what I was doing and where they could or  
9 couldn't go without asking me permission first.

10 Q Do these Form Bs go into something called a *General*  
11 *Track Bulletin* to your knowledge?

12 A Yes, they do.

13 Q And to whom are those bulletins distributed?

14 A To the train crews.

15 Q So if something is put in that's listed as Form B,  
16 that is how the train crews know where work is being  
17 done on the tracks and that they either must stop before  
18 they get there or they must contact somebody before they  
19 cross that area; is that correct?

20 A That's correct.

21 Q And isn't it the case, sir, that the person whose  
22 name appears in the Form B report is the person they are  
23 supposed to contact?

24 A That's correct.

25 Q So on September 9, 2010, when you're working at  
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1 East Winona and working on the crossing planks, you had  
2 put out the Form B request for that day; correct?

3 A No. You've got the wrong day.

4 Q I'm sorry. Who put out the Form B on September  
5 9th?

6 A September 9th, that was the tie gang.

7 Q All right. Let's back up for a moment because I  
8 did ask you what you were doing at the section house  
9 earlier.

10 A No, I was on a different day. Sorry.

11 Q Okay. All right. Let's rewind this a little bit.

12 A Okay.

13 Q On the morning of September 9th, you had a  
14 conference call and you spent about an hour or so in the  
15 section house; correct?

16 A Yes.

17 Q All right. You conducted a briefing at least with  
18 Mr. Underhill; correct?

19 A Yeah. I think Brad had to go somewhere else, I  
20 don't think he was at the work location. And I had  
21 Elvin Smothers and they were setting Matt Kjos up to  
22 help me.

23 Q Okay. Was this all taking place at the section  
24 house or at the job site?

25 A This was taking place at the section house we were  
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1 talking about this, and then we got out to the job site.  
2 We had to rebrief with the tie gang to go under their  
3 protection of their Form Bs and stuff.

4 Q Okay. So I want to be clear on this. You're at  
5 the section house and you do some kind of a briefing and  
6 then you depart for the job site, which that day is East  
7 Winona; correct?

8 A Correct.

9 Q About -- do you remember about what time you left  
10 the section house to go to East Winona?

11 A It was after eight o'clock.

12 Q Okay. All right. When you got to East Winona, did  
13 anybody come to you to report that there were any  
14 difficulties with the project out there?

15 A No.

16 Q Isn't it -- didn't Mr. Underhill or somebody come  
17 to you to tell you that the hydraulic gun wasn't  
18 working?

19 A That was my truck driver, Elvin Smothers.

20 Q Oh, I'm sorry. Mr. Smothers came to you to tell  
21 you that the hydraulic gun wasn't working; correct?

22 A Correct.

23 Q Just for the record, when we're talking about the  
24 truck driving, Mr. Smothers operated something that is  
25 known as a boom truck; is that correct?

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1 A That is correct.

2 Q Tell us what that -- in the context of what you all  
3 were doing that day at East Winona, what was the purpose  
4 of the boom truck?

5 A The boom truck had the hydraulics to take the lags  
6 out. We were going to back up and take the planks out  
7 with the boom truck, and we didn't. Greg said he could  
8 do it with the loader. We had the tie gang held up, and  
9 he said he could do it and so that's what we agreed on  
10 and he pulled the planks out.

11 Q All right.

12 MR. DOUGLAS: May I have 577, please.

13 Q Mr. Koziara, are you able to see that photograph?

14 A Yes, I am.

15 Q Can you tell us what that is, please?

16 A This is the back of the boom truck I had at the  
17 time.

18 Q Okay.

19 MR. DOUGLAS: Move the admission of 577.

20 MR. MORGAN: No objection.

21 THE COURT: All right. 577 is admitted.

22 MR. DOUGLAS: May I also have 578.

23 THE COURT: So we don't keep the jury waiting,  
24 is there an objection to 578?

25 MR. MORGAN: No, Your Honor.

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1 MR. DOUGLAS: Move the admission.

2 THE COURT: 578 is received.

3 MR. DOUGLAS: Thank you. 579, please.

4 MR. MORGAN: No admission.

5 THE COURT: It's admitted.

6 MR. DOUGLAS: And 580.

7 MR. MORGAN: No objection.

8 THE COURT: Very good. It's in.

9 MR. DOUGLAS: Admit. Thank you. All right.

10 581.

11 MR. MORGAN: No objection.

12 THE COURT: And it's in.

13 MR. DOUGLAS: 582.

14 MR. MORGAN: No objection.

15 THE COURT: It's in.

16 MR. DOUGLAS: Fine. Thank you. May I ask for  
17 the photo that has the hydraulic gun on the tailgate,  
18 please. It might be 601. I'm not sure. Any objection  
19 to 601?

20 MR. MORGAN: No objection.

21 THE COURT: All right. 601 is admitted.

22 MR. DOUGLAS: Thank you.

23 BY MR. DOUGLAS:

24 Q Mr. Koziara, do you recognize -- I'm showing you a  
25 picture of what's been marked as Exhibit 601. Do you  
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1 recognize the device that's sitting on the tailgate  
2 there?

3 A Yes, sir. That's one of my hydraulic guns.

4 Q Is that similar to the hydraulic gun that was at  
5 East Winona on September 9, 2010?

6 A It could have been one of them.

7 Q Do you happen to know by looking at it is that the  
8 one that was broken and in need of repairs or is that  
9 just the other one?

10 A I have no idea. I didn't look at it.

11 Q Okay. All right. So this is a device that is used  
12 to unscrew the lags that are in the crossing plank;  
13 correct?

14 A Correct.

15 Q And I take it that these -- if we look at the hoses  
16 on that, those hoses hook up to a pressure -- a  
17 hydraulic system on the boom truck; correct?

18 A Correct.

19 Q All right.

20 MR. DOUGLAS: Now may I also have 600, please.

21 Q Can you tell me what's depicted in Exhibit 600?

22 A Those are plank lifters.

23 THE COURT: Any objection to 600?

24 MR. MORGAN: No objection, Your Honor.

25 THE COURT: Okay. I'm going to show 600 to the  
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1 jury. Would you like it in evidence?

2 MR. DOUGLAS: I'd move to admit, Your Honor.

3 THE COURT: Okay. It's in.

4 MR. DOUGLAS: Thank you.

5 BY MR. DOUGLAS:

6 Q Mr. Koziara, can you tell us what is a plank lifter  
7 and what is it used for.

8 A It's used to lift planks out of crossings.

9 Q So this device here, if I've got it correct, that  
10 would hook on to something that it hooks on to the boom  
11 truck; correct?

12 A Correct.

13 Q And this plank lifter is capable of physically  
14 lifting one of those crossing planks that weighs 1200  
15 pounds; correct?

16 A Correct.

17 Q So let me ask you, sir: The use of the cross --  
18 the use of the plank lifter, isn't that, in fact, the  
19 preferred method for removing crossing planks?

20 A Yes, it is.

21 Q Thank you. All right. But that particular day you  
22 weren't able to get that plank up; correct?

23 A Correct.

24 Q Perhaps we ought to at this point show -- let's  
25 see.

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1 MR. DOUGLAS: Do we have a picture of the lag  
2 that I could use? No? Okay.

3 Q Mr. Koziara, I'd like to show you this picture.  
4 Can you identify that for me?

5 A Yes.

6 Q Is that a lag?

7 A That is a lag that they put in for switches.  
8 That's not a crossing lag.

9 Q Okay. What would be the difference between a  
10 crossing lag and a switch lag?

11 A That's about six or eight inches long, and about an  
12 inch around, and the crossing lag would be about 18  
13 inches long and about a quarter inch around.

14 THE COURT: Mr. Douglas, would you make a  
15 record of what the exhibit is that you've shown him? I  
16 haven't shown it to the jury, by the way. If you want  
17 them to see it, you'll have to make a better record.

18 MR. DOUGLAS: Yes. This would be marked as  
19 Exhibit 659.

20 THE COURT: Is there any objection to that one?

21 MR. MORGAN: Other than it's not the lag that  
22 we're talking about, Your Honor. I guess its relevance.

23 THE COURT: I'll overrule that. And I think,  
24 Mr. Douglas, just make a clear record of what we're  
25 looking at here.

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1 MR. DOUGLAS: Yes.

2 BY MR. DOUGLAS:

3 Q Mr. Koziara, Exhibit 659 I think you've indicated  
4 and you've agreed that that would be a lag that would be  
5 used for switch crossing planks or switch planks?

6 A Switch ties.

7 Q Switch ties.

8 A That's correct.

9 Q Thank you. You've indicated that the lags for the  
10 crossing planks are a little longer and a little  
11 narrower; correct?

12 A Correct.

13 Q I'll do my best to get a picture of one for you  
14 tomorrow, okay? Thank you, sir. All right.

15 At some point after you arrived at East Winona on  
16 September 9, 2010, you learned that the hydraulic gun  
17 wasn't working and that they weren't able to get at  
18 least one of the planks up; correct?

19 A No. Not one of the planks up. One of the lags  
20 were bent over into the plank, but they had gotten all  
21 the rest out.

22 Q Okay. So it was just the one crossing plank;  
23 correct?

24 A Correct.

25 Q And was that the crossing plank that was on the  
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1 outside of the rail?

2 A Correct.

3 MR. DOUGLAS: Can we have the same picture back  
4 up if we can?

5 THE COURT: Mr. Koziara, you said they had  
6 gotten all the rest up. Do you mean they had gotten all  
7 the rest of the crossing planks out or they had gotten  
8 all the other lags --

9 THE WITNESS: Crossing lags out.

10 THE COURT: Of that plank that you wanted to  
11 move. All the other lags were taken out of that plank;  
12 is that correct?

13 THE WITNESS: Yes.

14 THE COURT: So the one -- the one bent lag was  
15 left.

16 THE WITNESS: Yes.

17 THE COURT: Okay. All right. You're putting  
18 that picture back up?

19 MR. DOUGLAS: We are attempting. Zoom in on  
20 the picture, please.

21 BY MR. DOUGLAS:

22 Q This is from Exhibit 564, I believe. Mr. Koziara,  
23 that is the -- do you recognize that photograph?

24 A Yes.

25 Q Do you recognize it as being the photograph from  
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1 the reenactment?

2 A Yes. Incorrect as it is.

3 Q All right. Well, let's talk about that for a  
4 moment; all right?

5 A Okay.

6 Q First, let's see --

7 MR. DOUGLAS: Is it published to the jury?

8 THE COURT: It is, yes.

9 MR. DOUGLAS: Okay. Thank you.

10 Q Let's see if we can't clear up any corrections; all  
11 right? First of all, I believe you told us -- you told  
12 me previously in depositions and others that where this  
13 person is depicted in the photograph is not exactly  
14 where you were standing; correct?

15 A That's correct.

16 Q I think -- if you want to use your finger, where  
17 were you standing at that time?

18 A (Indicates)

19 Q So you were standing just on the other side of the  
20 rail on a crossing plank?

21 A Yes.

22 Q Okay. And about how far distant would you be from  
23 that point that you just put the arrow to where the  
24 front-end loader was?

25 A I would be probably five to seven feet from the  
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1 loader.

2 Q And can you tell us, sir, I think you know this,  
3 what is the width of the track?

4 A It's eight foot.

5 Q I'm sorry, sir. The distance between the two  
6 rails.

7 A Oh, the inside or the outside?

8 Q Either.

9 A Okay. The inside would be -- a normal gauge is  
10 56-and-a-half inches.

11 Q Thank you, sir. So like four-and-a-half feet?

12 A Correct.

13 Q Okay. Thank you, sir. Now, let's take a look at  
14 this picture. You said there was something else that  
15 was not correct in this reenactment. What is not  
16 correct in your view in this reenactment photo?

17 A The angle of the forks is overexaggerated.

18 Q So the forks were at a lower angle or a higher  
19 angle?

20 A They were lower.

21 Q All right. So that's one thing. But where the  
22 forks are touching that plank, is that the plank that  
23 you had difficulty getting up?

24 A That's correct.

25 Q So aside from the angle perhaps not being correct,  
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1 when Mr. Zielke was operating the front-end loader, that  
2 was the plank that he was trying to pop up; correct?

3 A That's correct.

4 Q And that's the plank that you testified came over  
5 the top of the crossing at you; is that right?

6 A That's correct.

7 Q When you got to the site on September 9, 2010, walk  
8 me through this, please. What did you do when you got  
9 to the site at East Winona?

10 A I got to the site. I got on the tie gang's  
11 authority with Al Mitchell. Job briefed with my crew  
12 and told them we needed to take the lags out, which they  
13 did, which they got all done mostly -- all the lag bolts  
14 out of the crossing planks. And then Elvin had told me  
15 that they had one that was stuck in there. So I told  
16 that to Mr. Zielke, who said he could get it out faster  
17 and pull the planks up. I went back across to give him  
18 hand signals and told the crew to go over and stay  
19 safely out of the way. And they were fixing the gun at  
20 the time.

21 Q Okay. And where was the crew that was fixing the  
22 gun at the time?

23 A Could you go back to the one that has East Winona  
24 on it?

25 Q I can certainly try.

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1 A The next one.

2 Q Would that be satisfactory?

3 A That will work.

4 Q Okay. All right. I'm going to, with your  
5 permission, I'm going to clear these arrows. Okay?

6 A Yeah.

7 Q Okay. All right. Can you tell us or put an arrow  
8 where the boom truck was?

9 A The boom truck would have been right about here.  
10 (Indicates)

11 MR. DOUGLAS: So let the record indicate the  
12 witness has drawn two -- has drawn some arrows that are  
13 on the same side of the track where the front-end loader  
14 is in the other pictures, but closer to the crossing  
15 sign that says East Winona.

16 Q Is that fair, sir?

17 A The front of the truck would have been where the  
18 East Winona sign would have been, and it's about a  
19 40-foot truck.

20 Q Okay. So the front of the -- would it have been  
21 like parked up right against the sign?

22 A At least.

23 Q Okay. Because it's a 40-foot truck. I got it.  
24 Okay. So then the end of the truck was facing toward  
25 us, if we're looking at the screen; correct?

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1 A Correct. And that's the work area.

2 Q All right. And the hydraulic gun was on the  
3 tailgate of the truck?

4 A Correct.

5 Q And the men, whoever was working on it was working  
6 on it on the tailgate of the truck; correct?

7 A Correct.

8 Q So those people were -- how far away would you say  
9 the end of the truck was from -- well, let me withdraw  
10 that. Okay.

11 So they're all working over there on the truck.

12 All right. What happens next?

13 A If I remember, I think Greg took out one of the  
14 planks here (indicating) and then he came back over to  
15 work on this one, and when he stuck his forks in  
16 straightwise, he popped it up. And I don't know why he  
17 put it back down. Then he just raised it up a little  
18 bit and went into the rail with it and that's when it  
19 popped across. I'm sure it was pressure on the plank,  
20 and it shot across and it got me on the other side. I  
21 was trying to readdress him and tried to rebrief with  
22 him before he did anything else, but it was too late.

23 Q So did you have a briefing with Mr. Zielke when you  
24 arrived at the site?

25 A Yes.

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1 Q And did you tell Mr. Zielke that the lags were  
2 still in one of the planks?

3 A Yes.

4 Q Who made the decision to use the front-end loader  
5 with the forks to pry up the plank?

6 A Greg did.

7 Q You were the foreman though; correct?

8 A His machine.

9 Q He reported to you, didn't he?

10 A He listened to what I say, yes, because I'm the  
11 foreman.

12 Q He suggested using the front-end loader as to pry  
13 up the plank; correct?

14 A That's correct.

15 Q And you approved it as the foreman.

16 A That's correct.

17 Q And you made sure that everybody else was out of  
18 the way; correct?

19 A Correct.

20 Q And then you stood on the crossing plank just  
21 across from the front-end loader; correct?

22 A Yes.

23 Q Did you have your walkie-talkie radio with you,  
24 sir?

25 A No, I did not.

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1 Q Isn't it customary for you, as the foreman, to have  
2 had that walkie-talkie radio?

3 A Not when I've got the truck sitting right behind  
4 me.

5 Q Are there alternative methods of communication with  
6 someone like Mr. Zielke in the front-end loader that  
7 were acceptable at the time?

8 A Hand signals.

9 Q And hand signals though would require line of  
10 sight; correct?

11 A Yes.

12 Q Did you have line of sight with Mr. Zielke when he  
13 was in the cab operating the truck?

14 A I did until he was engrossed in his task.

15 Q So when the forks of the truck were operating, you  
16 no longer had line of sight with Mr. Zielke; is that  
17 correct?

18 A That's what I was trying to rebrief with him.

19 Q And what you were trying to do was walk around and  
20 get over to Mr. Zielke; is that correct?

21 A That's correct.

22 Q You could have waited for the hydraulic gun to be  
23 repaired, couldn't you?

24 A It wouldn't have mattered. The lag was still bent  
25 over inside the plank.

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1 Q Was the use of the forks then in your opinion the  
2 only way to remove that plank?

3 A Yes.

4 Q But you didn't have to be standing where you were;  
5 isn't that true?

6 A No. But the planks never go that far. I've never  
7 in my 32 years ever seen a plank do that. Ever.

8 Q Well, as they say, Mr. Koziara, there's a first  
9 time for everything.

10 MR. DOUGLAS: Your Honor, we're at about 5:30.  
11 Would this be convenient to break at this time?

12 THE COURT: It would be a perfect time to take  
13 our break and we'll continue with Mr. Koziara's  
14 cross-examination tomorrow morning.

15 Ladies and Gentlemen, thank you for your patience  
16 today and your attention. And remember not to talk  
17 about the case or do any research. And we will see you  
18 back here so that we can start court again at nine  
19 o'clock. Thank you. Have a good evening.

20 (Jury excused from courtroom at 5:29 p.m.)

21 THE COURT: All right. Very good. I'm not  
22 aware of anything that we need to address outside the  
23 presence of the jury, but that's why I'm checking in.  
24 So is there?

25 MR. KASTER: We don't have anything, Your  
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1 Honor. Is there a reason why you want us here early  
2 tomorrow?

3 THE COURT: I don't think. Did we send out a  
4 notice asking -- giving you a time early?

5 MR. KASTER: No. I just want to make sure.

6 THE COURT: Yeah, no. I don't -- unless you  
7 have something -- unless you have a need to take  
8 something up with the Court before the jury gets here,  
9 nine o'clock is good for counsel as well as the jury as  
10 far as I'm concerned.

11 MR. KASTER: Thank you.

12 MR. DOUGLAS: Thank you.

13 THE COURT: Very good. We will see you  
14 tomorrow morning.

15 (Proceedings concluded at 5:30 p.m.)

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1 I, LYNETTE SWENSON, Certified Realtime and Merit  
2 Reporter in and for the State of Wisconsin, certify that  
3 the foregoing is a true and accurate record of the  
4 proceedings held on the 2nd day of March 2015 before the  
5 Honorable James D. Peterson, District Court Judge for  
6 the Western District of Wisconsin, in my presence and  
7 reduced to writing in accordance with my stenographic  
8 notes made at said time and place.  
9 Dated this 6th day of March 2015.

10  
11  
12  
13 /s/

14 Lynette Swenson, CRR,RMR  
15 Federal Court Reporter  
16  
17

18 The foregoing certification of this transcript does not  
19 apply to any reproduction of the same by any means  
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